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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A.D. 1944

Term No. 4304

Agenda No. 14.

323 I.A. 71
43

UNION TRUST COMPANY of EAST ST. LOUIS,

Plaintiff,

vs.

ELMER C. RUECK, EDITH HORINE RUECK and C. G. OZIER,

Defendants.

HOWARD R. MOORE,

Petitioner-Appellee,

vs.

ELMER C. RUECK and EDITH HORINE RUECK,

Defendants-Appellants.

Appeal from the Circuit Court of St. Clair County, Illinois.

CULBERTSON, P. J.

This appeal is prosecuted to reverse a decree entered in the Circuit Court of St. Clair County, on March 22, 1943, awarding petitioner, HOWARD R. MOORE (hereinafter called plaintiff), a Writ of Assistance against Appellants, ELMER C. RUECK and EDITH HORINE RUECK (hereinafter called defendants), for the possession of a certain house and lot located near East St. Louis, in St. Clair County.

The defendants owned the property involved, and to secure an indebtedness owed by them to Union Trust Company of East St. Louis they, on February 9, 1939, encumbered the same with a real estate mortgage. They defaulted in the payment of that indebtedness, and on January 9, 1941, the bank instituted its foreclosure suit in the Circuit Court of St. Clair County. The record discloses

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the defendants were personally served, but made default, and on April 18, 1941, a decree for foreclosure was entered in the cause, and the property here involved was ordered sold to satisfy the indebtedness due from the defendants. Among other provisions, that decree contained the following: "And it is further ordered, adjudged and decreed that upon the execution and delivery of the conveyance or conveyances, as aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into possession of the premises, so conveyed to him or them; and that any of the parties in this cause, who may be in possession of said premises or any part thereof, and any person, who since the commencement of this suit, has come into possession, under them or either of them, on the production of the Master's Deed of Conveyance and a Certified Copy of the Order of this Court, confirming the Report of said sale, shall surrender possession thereof to such purchaser or purchasers, his or their representatives or assigns." No appeal was perfected and this decree became, and is, final.

In accordance with the provisions of the decree the premises were sold by the Master-in-Chancery of the Circuit Court, on May 26, 1941. The Union Trust Company was the purchaser and the Master issued it a Certificate of Purchase. The Report of the Master-in-Chancery, concerning the sale and the purchase of the premises, was presented to and approved by the Court on June 2, 1941. There was a deficiency of $352.95 between the amount for which the property was sold and the amount due under the decree, and a judgment in that amount was rendered in favor of the bank and against the defendants, and on June 13, 1941 the Court appointed a receiver to manage the property during the period of the equity of redemption. It appears the defendants remained in the premises and paid the receiver rent at the rate of $30.00 per month. The last rent collected from the defendants, by the receiver, was on August 14, 1942, and purportedly covered the month

commencing with August 14, 1942 and ending September 16, 1942.

On May 27, 1942, plaintiff Howard R. Moore purchased the Certificate of Purchase from the Union Trust Company, and on August 27, 1942, he surrendered the Certificate of Purchase to the Master-in-Chancery and secured a deed to the premises. Defendants continued to occupy the premises. On September 10, 1942, plaintiff served defendants with a notice to vacate the property on or before thirty days from that date, and thereafter, on September 18, 1942, defendants sent plaintiff a postal money order for $30.00, purporting to be payment for one months rent, and this proffered payment the plaintiff refused to accept and returned same to defendants with a letter demanding possession of the premises. Plaintiff then wrote the Office of Price Administration for authority to institute a suit against defendants in Forcible Entry and Detainer, and on October 19, 1942, plaintiff commenced an action in Forcible Entry and Detainer against defendants before a Justice-of-the-Peace. He prevailed in that suit and defendants appealed to the Circuit Court of St. Clair County where the case was tried by the Court, without a jury, and plaintiff again prevailed. Defendants prosecuted and perfected an appeal to this Court to reverse that judgment.

On February 24, 1943, Plaintiff, as holder and owner of the Master-in-Chancery's deed, personally served defendants with a certified copy of the decree entered June 2, 1941, approving the Master's Report of Sale, exhibited to them his Master's deed, and in writing, demanded possession of the property on or before March 1, 1943. On March 2, 1943, the original foreclosure suit, by order of Court, was redocketed, and plaintiff, by leave of Court, filed his Petition for Writ of Assistance against the defendants. A hearing was had and it does not appear from the record that any question was made upon the hearing as to plaintiff's compliance with the provisions of the foreclosure decree of April 18, 1941, with reference to obtaining a Writ of Assistance. It appears that

defendants contended that plaintiff was not entitled to a Writ of Assistance, (first) because a suit in Forcible Entry and Detainer between the parties, was pending; and (second) since the entry of the decree, defendants had become tenants of plaintiff, and therefore, new rights had been acquired by them which would prevent the issuance of the Writ. Defendants advance the same contentions in this Court.

As to the first contention of the defendants, that this Writ of Assistance should not have been issued because a Forcible Entry and Detainer suit between the parties was pending, we must conclude that this contention is not tenable for the reason that the plaintiff had the right to employ two alternative remedies in order to obtain possession of his premises. He could bring an action of Forcible Entry and Detainer, and also, sue out a Writ of Assistance under the decree of foreclosure (VAHLE vs. BRACKENSEIK, 145 Ill. 231, 237). It seems to us that there can be no question that a Writ of Assistance is the appropriate process to be issued by a Court of Chancery to place the assignee of the purchaser of mortgaged premises, under a foreclosure sale, in possession of the premises involved (VAHLE vs. BRACKENSEIK, supra.), and this record discloses that the plaintiff had complied with all the requirements of the law and the foreclosure decree before applying for such Writ.

As to the second contention that, since the entry of the decree, defendants had become tenants of plaintiff and therefore new rights had been acquired by them which would prevent the issuance of the Writ, we must conclude, after having made a very careful examination of the record in this case, that there does not appear any evidence in this record that would warrant us in coming to that conclusion. The evidence wholly fails to show that the relationship of landlord and tenant existed between the plaintiff and the defendants. Defendants had no rights in the premises

after August 26, 1942, when the period of redemption under the foreclosure decree expired. The receiver had no authority to rent the premises to defendants after the expiration of the redemption period and this act of collecting rent for a period beyond the redemption period could not extend defendants rights to the premises (CHICAGO JOINT STOCK LAND BANK vs. McCAMBRIDGE, 343 Ill. 456, 461).

We cannot but conclude that the record in this case conclusively shows that the defendants in this case are wrongfully withholding possession of the property from the plaintiff, without the slightest semblance of justification.

No real defense appears to have been interposed in this case, and the Writ of Assistance, in our opinion, was properly issued, and the decree of the Court issuing same, being right and proper, finds affirmance at our hands.

Decree affirmed.

Abstract

FILED
FEB 28 1944
David G. Mallott
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A.D. 1944

Term No. 43017 Agenda No. 6

| | | |
|---|---|---|
| HOWARD L. SHORT, Plaintiff-Appellant, | ) | Appeal from the Circuit Court of Madison County. |
| vs. | ) | |
| E. B. CHRISMAN, Defendant-Appellee. | ) | |

CULBERTSON, P. J.

This is an appeal from a judgment in bar of plaintiff's cause of action and against plaintiff for costs, rendered by the Circuit Court of Madison County, on the verdict of a jury which found in favor of Defendant-Appellee, E. B. CHRISMAN (hereinafter called defendant), and against Plaintiff-Appellant, HOWARD L. SHORT (hereinafter called plaintiff). A motion for a new trial was made by the plaintiff herein, and argued before the Court, and denied, and this appeal follows:

An automobile accident which occurred on the morning of December 23, 1942 furnishes the basis for this litigation. The evidence in this case discloses that on the morning of the accident in question the plaintiff, seated in front seat of an automobile driven by his friend, SLOANE, was riding to his work at the Shell Oil Company Refinery in Roxana, Illinois. They drove from Godfrey to Alton, through Alton, East Alton, Wood River, and were going south on Route 111 near the Oil Refinery when the accident occurred. At the place of the collision, the evidence discloses, the road is level and runs straight north and south. Atmospheric conditions were especially bad on the morning of the accident as

there was a fog so dense that the black center line of the highway was visible only in places and the red tail-light of a car ahead, going in the same direction, could not be discerned for any considerable distance. The evidence shows that following the Sloane car (in which the plaintiff was riding) was an automobile driven by Howard Potts, a co-worker at the Shell Refinery. Due to the fog, Potts had been following the tail-light of the Sloane car for about three miles, at a distance of about twenty five feet, and traveling at a speed of about ten miles per hour. The evidence shows both cars had their lights on.

At the place of the collision Sloane saw a car stopped on the pavement in front of him, and applied his brakes. It appears from the evidence that there had been no ice on the pavement at any place prior to the scene of this accident, but that at the place where the collision occurred the pavement was icy and slick, with the result that when Sloane's brakes were applied his car slid forward. It was so foggy that an occupant of the Potts car, only twenty five feet behind, did not see the Sloane car when it began to stop and first noticed it sliding forward on the pavement ahead of them, whereupon Potts likewise applied his brakes and as Sloane slid southerly in an effort to stop, Potts' car slid along behind him at the same time. When both cars stopped the front end of the Potts car was about twelve or fifteen feet behind the Sloane car. When the Sloane car slid forward its rear end slid to the east, almost but not across the center line, while the Potts car stopped parallel with the slab in its own traffic lane. It appears from the evidence that both cars stood in this position for about two or three minutes, and that the motor was running in the Sloane car, but that during that time Sloane does not appear to have made any attempt to straighten his car by its own motive power, and neither driver appears to have made any attempt to get off the road, post anyone to the rear to warn traffic, or take any other

precautions to prevent an accident. At this point, the evidence shows, plaintiff on his own volition and without any request from his host, decided to get out of the Sloane car and push so as to "straighten it up," and it appears that plaintiff got out of the right front door of the car and walked northerly to the rear of the car and that as he did so he testified he could see the headlights of defendant's truck approaching about 100 to 150 feet from the north in its own traffic lane and toward the rear of the stopped cars. Plaintiff got to the rear of the Sloane car and began to push. It appears from the evidence of the defendant that as he approached the place where the accident occurred he was driving his truck at a speed of between ten and fifteen miles per hour and that his vision was limited to thirty feet, and at that speed, he testified, he could stop his truck on wet pavement within twenty five feet, and testified that as he proceeded southerly near the place of the accident, he was looking straight ahead when suddenly the tail-light and back end of the stopped Potts car loomed through the fog, about thirty feet in front of him. It appears from the evidence that the pavement was icy at the place of the accident and defendant testified that immediately upon seeing the rear of the Potts car he applied his brakes in an effort to stop, but his truck slid forward on the slick spot and his bumper struck the back end of the Potts car, causing the Potts car to slide forward some twelve or fifteen feet, and when he did so, plaintiff's leg was pinned in between the left front bumper of the Potts car and the right rear fender of the Sloane car. As the result of the accident plaintiff sustained a broken leg.

Plaintiff contends in this Court that the verdict and judgment in this case are not supported by the evidence and that the evidence shows plaintiff's injuries were caused by the negligence and carelessness of the defendant, and it is urged that the

Court erred in overruling the plaintiff's motion for a new trial and entering judgment upon the verdict. No complaint is made on the admission or rejection of evidence in this case, nor is any complaint lodged against instructions given or refused. It would seem to us that the questions of plaintiff's due care and of defendant's negligence were properly before the jury for determination in this case and there has been a determination of them by the jury that is reflected by the jury's verdict in favor of the defendant.

The verdict of not guilty, we believe, had abundant support in the evidence. In the absence of other intervening errors the verdict of the jury will not be disturbed. The Court will not substitute its judgment for that of the jury, unless it is clearly and unmistakably against the manifest weight of the evidence (JONES vs. ESENBERG, 299 Ill. App. 551, 555; PHILPOTT vs. PARHAM, 316 Ill. App. 278, 281).

The judgment rendered by the Court in this case, we hold to be right and proper, and the same is, therefore, affirmed.

Judgment affirmed.

**Abstract**

FILED
FEB 28 1944
David G. Mallott
CLERK OF THE APPELLATE COURT
STATE OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A.D. 1944

322 I.A. 72

Term No. 43025

Agenda No.28

| | | |
|---|---|---|
| CARLETOS S. DONALDSON, Plaintiff-Appellee, vs. BEULAH REYNOLDS, Defendant-Appellant | ) | Appeal from the Circuit Court of Alexander County. |

423 45 A

CULBERTSON, P. J.

This is an appeal from a judgment in the amount of $285.00 in favor of Appellee, CARLETOS S. DONALDSON (hereinafter called plaintiff), and against Appellant, BEULAH REYNOLDS (hereinafter called defendant). This suit was originated before a Justice-of-the-Peace, where a judgment was rendered in favor of plaintiff, and on appeal to the Circuit Court a trial was had before the Court and a jury, and a verdict for $285.00 was returned by the jury, upon which judgment was entered, and this appeal follows.

The factual situation that gives rise to this litigation is as follows: Ella McGee, the mother of the defendant herein, departed this life at about four a. m. on May 20, 1942, at Cairo, Illinois. It appears she was an elderly lady and lived in the same house where Lindsey Newborn resides. After the death of Mrs. McGee, Newborn called the plaintiff, who is an undertaker, and he arrived at the Newborn residence at about nine o'clock a.m. At that time he did not remove the body but was told by Newborn to come back later, and pursuant to those directions he did return at about eleven o'clock a.m., at which time he took the body of

Mrs. McGee to his undertaking establishment and there embalmed it. It appears that the defendant herein, who is a resident of St. Louis, Missouri, having been notified of the death of her mother, came to Cairo on the evening of her mother's death, arriving at about six o'clock, and that at about 7:30 the defendant herein went to the plaintiff's place of business and there certain arrangements were entered into for the burial and funeral of Mrs. McGee. The plaintiff herein contends that on arrival at his funeral home, defendant selected the casket, selected the clothes she wanted her mother buried in, ordered telegrams to be sent to relatives, notifying them of the day of the funeral, which telegrams she paid for, and that the plaintiff and defendant herein then agreed upon the complete arrangements for the burial and funeral in the sum of $285.00, and the plaintiff herein contends that the evidence establishes that the cost of the burial and funeral expenses was satisfactory to the defendant herein. While defendant doesn't deny going to the undertaking establishment of the plaintiff herein, she contends that they couldn't agree and didn't come to any definite arrangement.

Some time after this occurred, the plaintiff and defendant, appear from the evidence, to have come to a violent state of disagreement. This disagreement seems to have arisen from the insistence of plaintiff that he be given some insurance policies that would assure his being paid, and reached such violent proportions that the defendant herein conferred with another undertaker, and directed him to go to the undertaking establishment of the plaintiff herein and take therefrom the body of her deceased mother. A Mandamus suit was instituted, directed against the plaintiff herein, to secure the possession of the body of defendant's deceased mother. A church funeral had been arranged for, but the funeral did not take place at the church as an

attorney for the defendant herein stood on the steps at the church when the funeral cortege arrived and informed them that the funeral would not be held there, and it was not, but was held from the undertaking parlors of the plaintiff herein. There is some corroborating evidence in the record tending to support the contention advanced by the plaintiff herein that the defendant herein entered into the contractual relationship with him for the burial of her mother.

It is contended in this Court that the Circuit Court committed error in overruling the defendant's motion for judgment notwithstanding the verdict, and also in failing to allow defendant's motion for a new trial. The propriety of the Court's action in refusing two of the instructions tendered by the defendant is also challenged on this appeal, and assigned as constituting reversible error.

A consideration of the evidence in connection with this case clearly demonstrates that an issue of fact was tendered for the consideration of the jury, and in the light of the evidence offered, it very clearly appears to us that the Court properly denied the motion for a judgment notwithstanding the verdict. We have examined the two instructions which were tendered by the defendant and refused by the Court, and we are of the opinion that the Court's action in refusing to give them was entirely proper and in no way error.

There was, of course, a conflict in the testimony, and in that situation this Court has not the right to set aside such judgment, unless it is satisfied that it is manifestly against the weight of the evidence (PEOPLE vs. DIECKELMANN, 367 Ill. 372; JONES vs. ESENBERG, 299 Ill. App. 551; GRAHAM vs. DRESSEN, 292 Ill. App. 15). Our examination of the evidence in this case brings us to the conclusion, and we so hold, that the judgment

in this case is not against the manifest weight of the evidence, and should not be disturbed. A Court of Review has no right to substitute its opinion for that of the jury in cases of this nature, so long as the verdict of the jury is supported by sufficient evidence (AVEY vs. MEDARIS, 272 Ill. App. 209).

We are of the opinion that this record does not contain any reversible error, and that the judgment is amply supported by the evidence, and it is, therefore, affirmed.

Judgment affirmed.

## Abstract

FILED
FEB 28 1944
David G. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

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FEB 28 1944
David G. Mallott
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1944.

Term No. 43F11 Agenda No. 11

322 I.A.

| | | |
|---|---|---|
| PETER ZANTER, | ) | |
| Plaintiff-Appellee, | ) | Appeal from the Circuit Court of Franklin County |
| vs. | ) | |
| EVAN TODD, | ) | |
| Defendant-Appellant | ) | |

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BRISTOW, J.

This action was commenced before George B. Shaw a Justice of the Peace of Franklin County, Illinois in Benton Township, by Peter Zanter et al against Evan Todd. The purpose was to recover possession of a certain real estate. The plaintiff predicated his right to prevail upon a sheriff's deed. All the parties to the suit, residing in a township other than Benton Township, the right to institute this proceeding before Squire Shaw was questioned in a motion for change of venue. This motion was allowed, and the cause was transferred to Aud B. Cox, another Justice of the Peace of Benton Township. In his court, the defendant again urged that a Justice Court had no jurisdiction because the parties resided in another township.

Justice Cox overruled the motion challenging his authority to hear the cause and proceeded to the trial of the issues without a jury. The issues were found for the plaintiffs, and judgment for possession was entered for the plaintiffs, and against the defendant. From this judgment, the defendant perfected an appeal to the Circuit Court of Franklin County.

A motion was made there to dismiss the appeal because of the insufficiency of the appeal bond. A hearing on that

motion was held, and motion to dismiss appeal was denied.

A trial was had in the Circuit Court of Franklin County, and, the court hearing the cause without a jury, found the issues for the plaintiff, and ordered a writ of restitution to issue. This judgment was entered on February 2, 1942.

From this judgment, the defendant, Evan Todd, sought to perfect an appeal to the Appellate Court, Fourth District, Illinois. A notice of appeal was filed in the office of the Clerk of the Circuit Court of Franklin County, Illinois on March 28, 1942. A transcript of the record in the case was not filed until June 3, 1942, the same being 67 days after notice of Appeal was filed. Transcript of the record must be filed in Appellate Court within sixty days from the time that the notice of appeal is filed in the office of the Clerk of the Circuit Court. Subparagraph Two of Rule 36 of Supreme Court of Illinois, Casens v. Paynter et al., 290 App. 288; People v. London and Lancashire Indemnity Co. of America, 295 App. 582.

We might also make this observation that the Court having before it only the common law record, and none of the errors urged by appellant appearing in it, we would be compelled to hold adversely to the contention of appellant. The principal error urged is that the trial court was without jurisdiction to hear the cause. No where does it appear in the record that a motion was made in the Circuit Court, challenging its jurisdiction. Questions of incorrect venue of a case appealed from a Justice of the Peace Court to the Circuit Court is waived when not raised in the Circuit Court. Russell v. Barnowski, 311 App. 293. There was no report of proceedings filed in this case, and in its absence only those errors appearing on the face of the record can be considered. Weber v. Sneeringer 247 App. 294; Kalish v. City of Chicago, 219 Ill. 133.

We are of the opinion that this appeal should be dismissed, the appellant not having complied with Rule 36 of the Supreme Court of Illinois.

APPEAL DISMISSED .

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

322 I.A. 73

February Term, A. D. 1944.

Term No. 43M17 Agenda No. 13

| | | |
|---|---|---|
| HOWARD R. MOORE, Plaintiff-Appellee, | ) | Appeal from the Circuit Court of St. Clair County, Illinois |
| vs. | ) | |
| ELMER C. RUECK, Defendant-Appellant | ) | |

BRISTOW, J.

The defendant, Elmer C. Rueck, had been the owner of a certain dwelling house, the right to possession of which is the subject of this litigation. He executed a mortgage on the same to the Union Trust Company of East St. Louis, Illinois. He defaulted in his payments under that mortgage, and foreclosure proceedings were instituted on the 9th day of January, 1941. No appearance was made by him in that proceeding, whereupon a decree of foreclosure was entered on the 18th day of April, 1941. On the 26th day of May, 1941, the premises were sold under the foreclosure decree by the Master-in-Chancery of the Circuit Court. A certificate of purchase was issued to the Trust Company, the mortgagee, who became the purchaser at that sale. The purchase price was $352.95 less than the indebtedness, and a deficiency decree in that sum was entered against the defendant. On June 13th, a receiver was appointed by the Circuit Court to collect rents and apply the same on the deficiency. The defendant remained in possession of the premises and paid the receiver a monthly rental of $30.00. The last rental was collected on August 14th, 1942, covering the period from that date to September 15th, 1942.

The plaintiff herein obtained the certificate of

purchase from the Union Trust Company of East St. Louis on the 27th day of May, 1942. There having been no redemption, on August 27th, 1942, the plaintiff surrendered his certificate of purchase and the Master-in-Chancery executed him a deed to the premises in question.

On September 10th, 1942, plaintiff advised the defendant that he had sold the property; requested him to vacate; and served him with the following notice:

"September 10, 1942

To: Mr. Elmer C. Rueck

You are hereby notified that you are to vacate the premises which you now occupy, known and described as 1634 North 48th Street, East St. Louis, Illinois, on or before Thirty (30) days from this date, September 10, 1942, according to the laws of the State of Illinois.

Your lease to said premises will terminate on the 10th day of October, 1942.

Yours very truly,

(Signed) Howard R. Moore."

On September 19th, 1942, plaintiff tendered defendant $30.00 rent, but this was refused. Defendant refused to vacate, and this proceeding was instituted to obtain possession. After a hearing before the court without a jury, a judgment for possession was entered. From this judgment the defendant presents this appeal.

The defendant makes the contention here that the relationship of landlord and tenant existed between the plaintiff and defendant, and that the notice served herein not complying with Chapter 80, Section 6, Illinois Rev. Statutes 1941, the defendant was entitled to prevail in the forcible entry and detainer action. The defendant claims that since the plaintiff proceeded under a

statute which pertains solely to the termination of a tenancy, that thereby, he impliedly adopted the defendant as his tenant. Argument is also urged that since the plaintiff used the word "lease" in his notice that that is indicative of his attitude toward the defendant.

We are unable to subscribe to this rather strained interpretation urged by defendant's counsel. Practically everything in the record denotes that the plaintiff never thought of adopting the defendant as his tenant. For instance, immediately upon his receiving title to the property on August 27, 1942, the plaintiff went to Rueck and told him that he was going to offer the place for sale, and wanted him to move, and that he would take care of the defendant's moving bill and pay him for any inconvenience caused him. It is apparent from this approach that the plaintiff contemplated trouble, and that he wanted to get rid of Rueck. Afterward on September 10th, 1942, the plaintiff told him that he had sold the property and named the party to whom it was sold, and told Rueck that he wanted possession. The defendant told Mr. Moore that he had located a house, but later, it appeared that the new house was not satisfactory. Then the defendant refused to accept the tendered rent. It is true that tenancies may arise from an implied contract predicated upon the conduct of the parties, but the conduct of the plaintiff, as the undisputed testimony discloses, forbids any thought that a tenancy was contemplated by him. Moore had sold the property and certainly did not want the estate encumbered with a lease with any one.

The court heard the evidence and held that there never existed the relationship of landlord and tenant between the plaintiff and defendant, and we are of the opinion that he was abundantly justified in doing so. The record conclusively shows that the defendant is wrongfully withholding possession of the property from the plaintiff without the slightest justification. A

citation of authorities seems unnecessary to justify this view.

Judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

## Abstract

FILED
FEB 28 1944
David G. Mallett
CLERK OF THE APPELLATE COURT
OF 4TH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1944.

322 I.A. 73

Term No. 4306 Agenda No.16

48

| | | |
|---|---|---|
| GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, | ) | |
| Plaintiff-Appellee | ) | Appeal from the |
| vs. | ) | Circuit Court of |
| HARRY POLLACK and L. POLLACK, Co-Partners, Doing Business as POLLACK BROTHERS, | ) | Williamson County |
| Defendants-Appellants | ) | |

BRISTOW, J.

This is an action in trover for the value of railroad rails claimed unlawfully converted by defendants, to their own use.

The pleadings charge conversion by several parties defendant, including appellants. At the conclusion of the trial, which was before the court without a jury, the cause was dismissed as to several defendants; default judgment was entered against one; and judgment for $711.25 was entered against appellants. From this judgment, appellants appeal.

Cosgrove-Meehan Coal Company operated a coal mine. Five thousand feet of railroad rails constituted the run-around or high-line track laid upon the Coal Company property at one of its mines, which connected with the railroad of Plaintiff. This Coal Company became bankrupt, and defendant, Frank Fries, was appointed its Trustee in Bankruptcy. As such Trustee, he sold all the real and personal property of this Coal Company to one Maurice P. Angland. Two brothers, Joe Williams and John

Williams, as agents of Angland, re-sold some of the Coal Company property. A large part of which was junk, cars, equipment and steel rails, was sold to appellants, who are engaged in the Junk Business.

L. A. Baucom, Supervisor of tracks and maintenance of Missouri Pacific Railroad, and of its receiver, plaintiff, testified that for twenty-two to thirty-two years, through its section foreman and section men, it had repaired and maintained this track, which was called a run-around track or high-line track, which was about 2500 feet long; that he had been Supervisor of Tracks since 1926. He said that he knew which tracks belonged to the Missouri Pacific Company, and which belonged to the Mining Company; that he supervised the work of maintaining the tracks, servicing the lines, replacing and changing the ties and rails, and that he had repaired and maintained this high-line in question. He stated that this track was under his particular supervision and that the rails had disappeared; that he had called upon Mr. Pollack, one of the appellants, who told him that he had received the rails in September, 1936. Mr. Baucom first learned that the rails had been removed, in 1937. With Mr. Elliott, who also represented the Trustee-Appellee, he called at the place of business of Appellants, and asked where they got the rails. They both stated that Appellants showed them the rails, receipts and check for same, and stated that they had purchased the rails from the high-line track from Joe Williams and John Williams. Appellants deny making such admissions and deny that they took any rails from the high-line track.

The Williams Brothers testified that so far as they knew, they did not sell appellants any of the right of way of the Missouri Pacific Railroad. Joe Williams testified that they took occasion to learn the ownership of the various properties they were selling to Appellants. He stated that they contacted a

Mr. McDaniels, who had been a superintendent of this Coal Company. He testified that, in the presence of Appellants and themselves, McDaniels phoned to some person who was supposed to be connected with the Missouri Pacific Company, and that then McDaniels gave them some instructions, and certain marks were made on rails, and that the rails were then taken up, sold and purchased. They stated that McDaniels called for a man named Axline. The Court properly struck out the conversation, one end only of which the Williams Brothers and Appellants heard. There was no proof that Mr. Axline was at the other end of the phone conversation, or who Mr. Axline was.

Joe Williams also testified that he and his brother had sold some stuff to other people besides Pollack Brothers, appellants, but had not sold any rails to any other person, that he recalled. Joe Williams testified that they were worried about the track all around. There is no proof that any letter or message of inquiry was made to the Receiver, or any person in authority representing him, to learn what tracks were owned by the Receiver of the Railroad Company. The Williams Brothers and the defendants apparently relied solely upon representation of ownership received from the former superintendent of the coal mine.

The positive testimony of the track supervisor that the Missouri Pacific Railroad Company owned this track, and the circumstances and the testimony indicating that the track had been sold appellants, clearly show that Plaintiff-Appellee was the ownerof this high-line track which was laid upon the land of this Coal Company, and that Appellants, when purchasing the rails, made no reasonable investigation from the Plaintiff Trustee to determine which tracks were owned by the Missouri Pacific Railroad. Without receiving such definite information, which presumably could easily have been obtained, appellants were pleased to

to proceed to buy the rails upon the mere assertion of Williams Brothers or of the former foreman of the Coal Mining Company.

Appellee contends that it owns these rails, and that appellants unlawfully converted them to their own use. Appellants contend that the rails belonged to the Coal Company, or by attachment to the real estate of the Coal Company, became a part thereof, whereby defendants did not wrongfully convert appellee's property.

Appellants argue earnestly and contend, that if they are guilty, that those defendants who were found not guilty by the Court, viz: The Trustee in Bankruptcy in his individual capacity, and in his official capacity, his bondsmen, and Maurice P. Angland, each, should likewise have been found guilty. The only question for determination in this review is whether the judgment was erroneously entered against Appellants.

The Court saw and observed the witnesses on the stand, and was in position to best judge the truth of their statements. We find nothing in the record that would cause us to find that Appellee was not the owner of these rails, or that Appellants did not purchase them. Appellants earnestly argue that even if the rails were owned by Appellee, that since Appellee laid them into a track imbedded upon the land of the Coal Company, that the rails ceased to be personal property and became a part of the real estate of the Coal Company.

Whether a chattel becomes a fixture depends upon the nature of the articles affixed, relation and situation of the party making the annexation, and the purpose for which the annexation is made.

The test under modern authorities seems to give preeminence to the question of intention to make the article a permanent accession to the freehold. Fifield vs. Farmers' Nat'l.Bk. 148 Ill. 168, 170; Sword vs. Low, 122 Ill. 487; Hewitt vs. General Electric, 164 Ill. 420, 424; Owings vs. Estes, 256 Ill.

553, 556.

Intention should be inferred from the nature of the article affixed, relation and situation of the party making the annexation, and the purpose and use for which the annexation is made. 22 Am. Jur. Page 720, Sec. 7.

Side tracks and spurs constructed by a railroad company, upon the lands of another, if done to aid in the discharge of obligations as a public carrier or accommodating the owners of manufacturing or mining enterprises situated along the line of the railroad, are not fixtures which cannot be removed by the Railroad Company from the land. 22 Am. Jur. Page 768, Section 53 and notes; Hubbard vs. Missouri Pacific Railroad, 288 Fed. 945 (and cases there cited); Loraine Steel Co. vs. Norfolk Ry. 187 Mass. 500, 73 N.E. 646; Estate Property Corporation vs. Hudson Coal Company, 249 N.Y.S. 418, 139 Misc. N.Y. 808.

Appellants cite several cases. On examination of these cases, we find they are not controlling on the facts and issues in the case at bar. The cases cited by Appellants rely upon the principles of annexation of chattels made by the owner of the real estate to his own property. In Texas Ry. vs. Schoenfield, 124 S.W. (2d) 910, the owner himself had made repairs and replacements and extended a spur and had replaced the original spur to 95% of its extent. On inquiry, the agent of the Railroad Company said that the track belonged to the owner of the land and not to the Railroad Company. The Court held that that track became a part of the real estate of the owner. In the case at bar, the plaintiff had repaired and maintained and replaced the track in question. In Kochs Co. vs. Wisk, 120 Fed, (2d) 603, 606, the Court held that since the owners had permanently installed machinery indispensable to the operation of its factory, that without more, it would be presumed that the owner intended that the machinery be affixed permanently to the premises.

In Basnight vs. Small, 79 N. E. 269, 163 N. C. 15, a man who owned land containing timber, and on which he had built and attached to the ground a logging railroad track, sold the land and in the deed reserved a number of trees. The question was whether the track passed under the deed. The Court recited the Common Law Rule between vendor and vendee, that whatever is affixed to the freehold by the vendor himself becomes a part of it. The Court further based its finding on the fact that this railroad was built and adapted to the taking out of this timber, and that the buyer also got timber which was not excepted from the deed, and that the intention must have been that the railroad was a part of the land, and that otherwise it would have been excepted from the deed, since the deed particularly excepted certain kinds of trees.

The relation of Plaintiff to Cosgrove-Meehan Coal Company was that of a common carrier to a producer of a heavy product usually hauled from a spur track to an adjoining railroad, and from thence to distant markets. The proof was indisputable that, since 1926, the Missouri Pacific Railroad openly had charge of this high-line track, had repaired it, and had openly had charge and control of its maintenance and repair whenever this coal mine was in operation. Not only was this notice of ownership, but was a circumstance which defined the relationship between this Railroad Company and this Coal Company and denoted that this track was not a fixture and property of the Coal Company, but was the personal property and responsibility of the Railroad Company. The nature of such articles which were attached, viz., railroad rails upon ties imbedded in the ground so that cars might safely pass over said track, was such a relationship that the removal of said rails might be effected without injury to the land. This use, control and repair of this track by the Railroad Company showed that the purpose of such annexation,

quite apparently, was to provide a means of transportation of cars loaded with coal at said mine out upon the main line of said railroad, and from thence to markets.

In addition to such facts and circumstances, the trial court had before it the positive testimony of the supervisor of tracks of said Railroad Company and of the Plaintiff Trustee, that the rails in question belonged to the Trustee, and that neither the Railroad nor its Trustee had removed these rails. Any presumption of ownership merely because of possession, as claimed by Appellants, was overcome by positive testimony.

The trial court would have been justified in finding that Appellants were put upon notice of ownership of the Trustee of these rails and had negligently failed to follow a direct course of inquiry that would have fully advised them that the Trustee owned these rails. Where such a means of information exists and is not sought, one cannot plead ignorance of notice of actual ownership. State Bank of Waterloo vs. Potosi Tie & Lumber Company, 299 Ill. App., 524, 528; Clark vs. Leavitt, 335 Ill. 184, 191.

The evidence was ample upon which the trial court was justified in finding that these rails did not become a permanent fixture and part of the lands of the Coal Company.

The question of damages remains for consideration. A witness for plaintiff testified regarding the market value of rails, as scrap rails, at St. Louis. The cost of taking up, loading upon cars and transportation of rails to St. Louis is discussed by counsel. We think the true measure of damages in trover, in such case, is the value of the property converted at the time of conversion, with legal interest from that date. Sturges vs. Keith, 57 Ill. 451; The McLean County Coal Co. vs. Long, 81 Ill. 359, 364.

A person separating an article from lands, such as

coal, and unlawfully converting it, is not to be rewarded by credit for his labor in making such separation. Illinois & St. Louis Railroad Company vs. Ogle, 92 Ill. 353.

We do not feel it profitable to discuss, at length, the contentions of the parties regarding the rules of measure of damages, since the contentions of each party, in fact, merge into practically the same amount. A witness for Plaintiff fixes the values at St. Louis, at Five Thousand Feet of rails at $711.25. One of the defendants fixes the weight at 50 tons, and the value at Pittsburg, Illinois, where the rails were bought, at ten or eleven dollars per ton. Taking the price fixed by the testimony of defendant, and adding thereto interest at 5% per annum from September 3, 1936, the date of the purchase, to the date of the rendition of the judgment in 1942, would produce a result of more than seven hundred dollars. This, in any event, would be only a few dollars less than the amount adjudged due by the court. If there is an excess in the amount of the judgment over that shown by competent proof and evidence, the excess is too small to require a retrial. The rule de minimis non curat lex, aptly applies. Chapman vs. Cary, 238 Ill. App. 605, 610; Cowan vs. Terrell, 273 Ill. App. 194, 198; In re Estate of Schriver vs. Oak Park Trust and Savings Bank, Executor, 289 Ill. App. 581, 586.

Finding no error which would require reversal of this judgment, the same should be and accordingly is, affirmed.

JUDGMENT AFFIRMED.

Abstract

FILED
FEB 28 1944
David G. Mallett
CLERK OF THE APPELLATE COURT
FIRST DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1944.

Term No. 43016 Agenda No. 12.

322 I.A. 74

| | |
|---|---|
| AGNES LEHAN and HENRY LEHAN, Plaintiffs-Appellees, vs. EAST ST. LOUIS SHADE AND FIXTURE COMPANY, INC., a Corporation, MARTIN MILLER and JACK MILLER, Defendants-Appellants. | Appeal from the City Court of East St. Louis, Illinois. |

BRISTOW, J.

Agnes Lehan and Henry Lehan, husband and wife, instituted suit in the City Court of East St. Louis, Illinois, against appellants for damages for assault and false imprisonment. The jury returned its verdict in the amount of $500.00 in favor of each plaintiff, against the defendants. The trial court denied defendants' motions for directed verdict and for new trial upon a remittitur of $300.00. The plaintiffs agreed to this reduction, and the court entered judgment against defendants in favor of each plaintiff for $200.00 and costs. From this judgment defendants have appealed.

East St. Louis Shade and Fixture Company, Inc., was engaged in the retail business of selling linoleum, Venetian blinds and furniture, and had a store in East St. Louis, Illinois. Martin Miller, called Marty, and Jack Miller managed the business.

On March 14, 1942, Martin Miller went to the home of the plaintiffs on the outskirts of East St. Louis, and made measurements for Venetian blinds, and took the order for the same. Later he went again to plaintiffs home and took measurements for

linoleum, and added this item to the order. Subsequently, the plaintiffs came to the store and selected the linoleum patterns desired. On May 6, 1942, the linoleum was laid. There was a delay in filling the Venetian blind order, due to the difficulty in procuring some hardware which was necessary to complete the order. The delay displeased the plaintiffs no end. On May 15th, Mrs. Lehan called up the defendants and cancelled the order. Some unpleasant words were interchanged between the parties in this telephone conversation. Martin Miller told Mrs. Lehan that she could not cancel the order, and that if she persisted in that attitude, he would be compelled to sue her. The lady betook herself immediately to her lawyer, Mr. Saul Cohn, who made an appointment for the Lehans to call at the Miller store to adjust the matter.

What transpired at the store is the basis for this litigation. The two plaintiffs testified to one state of facts. The two Miller brothers and their three employees saw things entirely differently.

Lets examine the testimony of Mrs. Lehan, applying the usual testsfor reasonableness or unreasonableness, probability or improbability. On direct examination she testified as follows: "Q. When you got to the store who did you see? A. We asked for Marty but he wouldn't talk to us and he sent for Jack and Jack came up. My husband talked to them about the shades. He told them Lawyer Cohn told us to come in. With that, Marty came out and Marty said that he told Mr. Cohn he didn't want to have a thing to do with us and he started taking punches at my husband. Then one after the other punched at him. Q. Who was there? A. I don't know how many clerks. Q. Were Martin and Jack there? A. Yes, and the customers they spoke of. Q. Where were you? In what part of the store? A. Back near the office. Q. Where is the exit with reference to where you were standing?

A. The exit was pretty far up from where we were. Q. Was anything done there with respect to locking the door? A. We went there with good intentions of straightening the thing out. If they had the shades we would have been willing to take them. Q. Was anything done about locking the front door? A. After they were fighting my husband I told them, "Don't hit that man. He is sick and under a doctor's care." He had a heart condition. They said, 'We don't care how sick he is. That won't keep us from knocking his head off.' I said, 'Let's get out. These people are crazy.' Marty said, 'Lock the door -- don't let them out. I am going to call the police.' Q. Did he lock the door? A. Yes sir, and put the key in his pocket. Q. Who did? A.Jack. Q. Was that the front door of the place of business? A. Yes, The front door by the street. Q. You say you were in there how long? A. About forty-five minutes. Q. Was the door locked all that time? A. Yes sir, all that time. Q. Were there any other customers who came in or out of the store at that time? A. There were three customers in there. They wanted to go out, but they never made any effort to leave them out. My husband said, 'Why don't you leave your customers out?' He reached in his pocket, took the key out and let the customers out, then he put the key back in his pocket. My husband had his back up against the door. They were punching him all the time. I ran in between. I guess that is the only thing that kept them from killing him.

MR. KARNS: I object to that.

THE COURT: It may be stricken.

Q. Were there any threats made to you? A. I told them, I said 'You two big oafs ought to be examined, punching on a little man, sick at that.' Jack said if I don't keep my mouth shut, he said 'I don't draw a line at no skirt.' Q. Did he make any move towards you? A. No, he just said that. Q. Were any further threats made to your husband? A. First one kept punching him,

then the other. It was just continuous almost. Q. Was anything said as you left the store? A. Well, he said to them, he said 'You realize what you are doing,' he said, 'You are holding us prisoners against our wishes, and you'd better leave us out of here.' Then Jack unlocked the door. Q. Was anything said as you left? A. He said if we didn't get out they would kick us out. Q. Can you tell us just how you felt while in the store? A. Terribly nervous -- I was so excited. I didn't know one minute they'd hit him and he was in bad shape. Q. What effect did this occurrence have on you? A. I was awfully nervous afterwards. I couldn't hardly eat my food. It wouldn't digest. I couldn't sleep at night. I had the doctor give me sedatives. I was sick for two weeks before I could control myself. Q. Did you go home after you left the store? A. Yes -- right home. Q. Did you eat dinner that evening? A. My mother had supper ready but we couldn't, either one of us, eat any. Q. Did you consult a physician about your condition? A. Yes, When I couldn't sleep at night. I walked the floor at night." On cross examination, Mrs. Lehan testified as follows: "Q. Now, they never did touch you did they? A. No, they never. Q. They never slapped you or hit you in any way or in any way laid a hand on you? A. No. Q. But they were throwing punches at your husband, is that right? A. Yes, throwing punches at him. Q. One right after the other? A. Yes, and I jumped in between them. Q. Both Jack Miller and Marty Miller? A. Yes. Q. This is Marty sitting here? A. Yes. Q. And that is Jack sitting back there, is that right? A. Yes. Q. Did they knock your husband down? A. No, They never hit him. Q. They never hit him? A. They never knocked him down. Q. They were wild with their punches -- They hit at him but missed him, is that right? A. Yes. Q. How long did that keep up? A. At least thirty-five minutes or forty. All the time we were in there. Q. They were hitting

at him for thirty-five or forty minutes? A. Yes. * * * Q. Nobody did a thing in there except the two Miller boys throwing punches at your husband? A. Yes. Q. But never did hit him? A. No. Q. Is that right? A. That is right. * * * Q. Now, about locking this door -- where were you when the door was locked? A. We were starting for the door. We were going to get out. He beat us to it and locked the door and put the key in his pocket. Q. Which one did that? A. Jack, and Marty said he was going back and call the Police. I don't know what he was going to call the police for. Q. Why did he say he was going to call the police? A. I don't know. Q. What had you done? A. Nothing. Q. What had your husband done? A. Nothing, He was as weak as a cat. He had been to the doctor the night before. Q. Had he been throwing any punches at that time? A. No sir. Q. What did he do when they were trying to hit him? A. Nothing that I saw. Q. He was sick then, wasn't he? A. Sure, he was sick. It was the first day he had been out. Q. He didn't try to hit them back, did he? A. No sir. Q. They threw those punches at him for thirty-five minutes but never did hit him? A. Most of the time they were in there. Q. But they didn't hit him? A. No sir. Q. You and your husband, and you were the only protection between him and the Miller boys during that thirty-five or forty minutes? A. Yes sir. Q And they never hit you? A. No, they never made any effort, but they tried to punch him. Q. They didn't even try to hit you? A. No sir. Q. But after thirty-five or forty minutes trying to hit your husband with nobody else but you who tried to interfere, they never even hit him one time, did they? A. No. Q. When they locked that door did you ask them to let you out? A. Sure Q. What did they say to you when they locked the door? A. They never said anything. They locked the door. He said, 'Lock the door, Jack. I'm going to call the police.' And he went back into the cage, I guess to call the

police. Then he came up to the front and the both of them were up there. My husband kept his back to the door. They were just continuously punching him. Q. By that time you had moved from the back of the office to the front of the store? A. We wanted to get out. Q. Had you moved from the back of the office to the front of the store? A. Yes. We were going to get out. Q. Did they attempt to hit your husband going from the back of the store to the front of the store? A. No. When I said, 'Let's get out of here.' Marty said, 'Lock the door, Jack. Don't let them out of here. I'm going to call the police.' And Marty went to the back to call the police. Q. How long were you held there before the door was unlocked? A. Forty-five minutes. We went in at five-thirty and I looked at the clock when we come out and it was quarter after six. Q. How long were you in there from the time they locked the door? A. I don't think we were in there over five minutes before the door was locked. Q. In other words, the door was locked right after you went in? A. No, not exactly. We were in the back of the store and they were punching at my husband and I said 'Lets get out of here'. That is when they locked the door. We were behind that locked door all the time. Q. Did I understand you to say they started punching before the door was locked? A. Sure. They were punching all the time we were in there you might say."

We will not repeat Mr. Lehan's testimony which was substantially a repetition of Mrs. Lehan's and is no more convincing or plausible.

In reply to the above charges, Martin Miller testifies as follows: that he weighed 235 pounds, and his brother Jack weighed 245 pounds; that the Lehans came to their store on the evening in question after their attorney, Mr. Cohn, had urgently requested Millers to let them do so. Martin Miller's testimony as to the occurrence after they arrived is as follows:

"Q. Mr. Miller, what time did they get into your place of business on the 16th? A. I would say about twenty-five after five or five-thirty. Q. Where were you when they came in? A. Sitting at my desk behind the glass partition. I looked up and saw them enter the store and asked the girl to call Jack, that I was busy and didn't want to wait on Mrs. Lehan. Q. Did Jack come Up? A. Jack came up. He came in the office and said they wanted to know when they were going to get their blinds. Q. Where were they? A. Standing in front of the glass partition. I says, 'All we can promise is what we have been promising. We are trying our best to get them out next week.' Jack walked back and said 'Next week.' With that Mr. Lehan burst out and said 'The same old crap' I got off my chair and walked around and I said, 'I am not going to stand for this type of language. First your wife gave it to me and now you are going it. If it hadn't been for Saul calling me up and interceding in your behalf I wouldn't ask you to come in this store at all. I refuse to sell you those Venetian blinds. Pay your bill and please leave the store.' Q. What was the condition of the front door? A. It was a warm day and the door was open. With that Mr. Lehan began to shout at the top of his voice. I had other customers in the store and I was quite ashamed that condition should go on. I again asked them to pay their bill and leave. He rushed across the store and took hold of a customer's arm. He said, 'Are you going to buy in this store? You see what they are doing to me? I want you as a witness. They sold me merchandise and refused to make the deal.' My sales girl interferred and asked them to leave. A crowd gathered in front of the store. I walked over to the door and unlatched the bottom part and let the door go to. I never locked that door with a key. I or Jack or anyone else. Q. Was that door ever locked while they were in there? A. No sir. Q. Then what happened, Mr. Miller? A. It was a second or two later

when the customers walked up and I apologized to the customers.

MR. WAGNER: Object to what he did to the customers.

A. (continued) Mr. Lehan said, 'Won't you be my witness?' The customer said, 'Let me out of this' and walked out. Q. Now, Mr. Miller, they were in there about how long? A. Not over ten minutes. Q. In your store? A. Yes sir. Positively. Q. Did you hit Mr. Lehan while he was in there? A. I never made an attempt as much as -- I was too anxious for them to leave. Q. Did you hit him? A. No sir. Positively not. That is absolutely untrue. Q. Was Jack there talking with you? A. Jack was there at the time. * * * * Q. Did Jack strike at Mr. Lehan? A. Of course not. Q. Or did he strike at Mrs. Lehan? A. That is absurd. Q. Did he make any effort at all to hit either one of them? A. Absolutely not. I would ask them to leave ---

MR. WAGNER: Object.

Q. I will ask you to tell the jury whether or not you laid any hand on either one of the plaintiffs in any manner at all while they were in there? A. I never even made an attempt. Q. Or did you make any attempt to lay a hand on either one? A. None whatever. Q. What about Jack? Did he make any attempt to lay a hand on them? A. Absolutely not." Martin Miller's version of the episode has support in the testimony of his brother and their three employees.

It is difficult to comprehend how a jury could be so endowed with imagination, credulity, and lack of ordinary common sense to believe the fantastic story told by Mrs. Lehan. We hear juries repeatedly admonished not to park their "horse-sense" on the outside when they are called into the jury box to decide a question of fact. Such wise advice is nonetheless applicable to courts of review. The trial court evidently did not subscribe to Mrs. Lehan's claims in their entirety, for it was of the opinion that the jury had exceeded its authority by $300. The court

ordered this sum remitted, else a new trial would be allowed. Certainly $500 was a very modest allowance if Mr. and Mrs. Lehan suffered the terrorizing experience outlined by her. For thirty-five or forty minutes, they were both in the throes of death. Picture, if you please, the agonizing pain and fright that plaintiffs must have undergone with two 240 pound giants, young and athletic, throwing potential death blows for more than half an hour. Mr. Lehan's damages can not be too lightly regarded when we consider that he was a small man, forty-nine years of age, and not in good health.

We are of the opinion that the verdict in this case is against the manifest weight of the evidence. The judgment is, therefore, reversed and cause is remanded for new trial.

REVERSED AND REMANDED.

## Abstract

FILED
FEB 28 1944
Harold G. Mallott
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1944 822 I.A. 74

Term No. 43028 Agenda No. 26

| | | |
|---|---|---|
| B. M. McGRAW, Plaintiff-Appellee, | ) | Appeal from the Circuit Court of Clay County. |
| vs. | ) | |
| W. W. SHAFFER, and W. W. TOLER, Doing Business as SHAFFER & TOLER, a Co-Partnership, Defendants-Appellants. | ) | |

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BRISTOW, J.

This cause comes to this court from the Circuit Court of Clay County on an appeal by defendants from a judgment entered against them in favor of the plaintiff in the sum of $2955.42. The jury was waived and a trial was had before the court.

The complaint alleges that plaintiff and defendants were all oilfield contractors; that the defendants, a co-partnership, verbally contracted with the plaintiff to perform certain services on an oilwell known as John Steber No. 1, and that the plaintiff performed the services at an agreed price, and by reason thereof defendants were indebted to him in the sum of $2955.42.

The answer denies the indebtedness; denies that the defendants entered into this alleged oral contract, and further alleges that the oilwell in question was owned by one A. H. Gibson, and that the oral contract was entered into by Gibson with the plaintiff, and hence the defendants were not liable for the amount claimed.

By the testimony and brief and arguments of the parties, it is conceded that the contract was fully performed at the agreed price. The only question to be decided by this Court is whether or not defendants contracted to pay the amount in question, the defendants contending that the contract entered into was entered

into by the defendant W. W. Shaffer as agent for and on behalf of A. H. Gibson, and was not, therefore, a contract of the defendants. The plaintiff contends that the contract was entered into by the defendants, and that he had no knowledge of any interest of A. H. Gibson in the oilwell, and had no knowledge that Defendant Shaffer was acting on behalf of Gibson, and hence the defendants were liable.

In view of the fact that much of the evidence is entirely irreconcilable, it is necessary to relate the substance of the same in order to present a complete picture of this factual controversy.

The substance of the plaintiff's testimony is that he knew W. W. Toler, one of the two members of the co-partnership, for some years, and had become acquainted with Shaffer in June, 1942 when he was negotiating with him about some work on other oil wells known as No. 1 Warren and No. 2 Warren; that he had some telephone conversations with Shaffer concerning the work to be done on these two wells, and the price was agreed upon, and the work completed; that he had no conversations with the defendants concerning the work to be done on John Steber No. 1, but that this work was performed after he had knowledge of it from his employee, Alva Barkley, sometime about August 1, 1942; that the daily drilling reports were made on the Warren wells, and the billings and invoices were billed to Shaffer and Toler; that one of the invoices on the Warren well was paid by a Mr. Gibson by Mr. Andrews, bookkeeper for the defendants; that he didn't know why Mr. Gibson paid him for the work. The plaintiff, Mr. McGraw, further testified that he had received payment on the Warren wells prior to the time operation began on the Steber lease; that he didn't expect to be paid by Mr. Gibson, but that he expected Shaffer and Toler to pay for the work on the well in question; and that he never made any effort to collect the account from Mr. Gibson, that the reason he didn't investigate the ownership of Steber No. 1 well was because Mr.

Shaffer said it was for Shaffer and Toler, and he considered them responsible. Mr. McGraw further testified that after the completion of the work on the Steber well, he caused an invoice to be sent the defendants, Shaffer and Toler, and later called their office and talked to their clerk, Mr. Andrews, who said they had not received the money for the contract yet; that about two weeks later, he again talked to Mr. Andrews who said that they did not have the money yet, and that as soon as they got it, he would send it to McGraw; that he called the office by phone several times, finally talked to Mr. Shaffer on the phone, and asked him when he was going to pay the invoice. The plaintiff stated that that conversation with Shaffer was as follows: "He said he wasn't going to do anything about it - it wasn't his invoice. I asked him why it wasn't, and he said that work was done for some fellow in Chicago; that he had several thousand dollars in it and he was waiting for his money too, and he wasn't going to pay it, and just to look to him for my money." Mr. McGraw also said that that was the first time he had heard of any person in Chicago or anywhere else who would be responsible for the job.

Alva Barkley, employee of the Plaintiff, testified that he acted as tool pusher on the Warren jobs at Bridgeport; that Shaffer wanted them to do some work on another oil well; that he told Shaffer he would have to contact McGraw, and did so; that Mr. Shaffer was on the Warren leases when plaintiff was finishing Warren No. 2; that Shaffer was there about every day; and that he saw Mr. Gibson there only one time. Barkley further testified that he had several conversations with Shaffer in regard to the Steber well the latter part of July while they were still working on the Warren lease; that he told Shaffer he thought they would take the other well; that Shaffer said to proceed with that well the same as the others, i. e., in the name of Shaffer and Toler. He further testified that one evening while they were drilling the Steber

No. 1 well, he told Shaffer that the boys didn't want to stay up there during "shut down", and that Shaffer said he would pay the shut down time on the labor. Barkley also testified that Gibson's name was not mentioned as the party who would pay for the shut down time; that he never saw Gibson on the lease, but that Shaffer was there every day.

James Gaither testified on behalf of the plaintiff as follows. He was bookkeeper for McGraw, and that on September 22, 1942, he made out "the itemized account due and owing to B. M. McGraw from Shaffer & Toler, for work done on the Steber No. 1 well" and attached to it the daily drilling reports, and then mailed it to Shaffer and Toler. The account was carried on the ledger in the name of Shaffer and Toler. He had never heard Gibson's name before in regard to the Steber No. 1 work. When Mr. Gaither was asked if A. H. Gibson had not made certain payments on the account in question, he said, "In a manner of speaking maybe; we invoiced Shaffer & Toler for the work and they paid us, even though he did sign the check."

W. W. Shaffer, one of the defendants, testified as follows. In June, 1942, he had a conversation with Barkley with reference to the work to be done on the Warren wells, and later McGraw called him and asked him who this work was to be done for, and he told him it was for Gibson and some others, and he told him Gibson came from Houston, Texas, and McGraw told him what the rate would be. Shaffer testified that at that time he was working for Mr. Gibson who was then in the army; that he had a contract with Gibson for the purpose of drilling Steber No. 1; that later, he had a telephone conversation with McGraw with reference to payment for the work on Steber No. 1, that being about thirty days before the suit was started. The defendant also testified that when he was asked as to when he was going to pay the bill, that he told McGraw that "Shaffer and Toler had nothing to do with the bill"; and that McGraw said,

"That's a nice way you have of getting out of your obligation,' and I said, 'That's not my obligation'"; that he never told McGraw that Shaffer and Toler would pay the bill for the work done on the Steber lease; that Mr. Gibson had employed Mr. Andrews, the defendants' bookkeeper, to take care of his bookkeeping, and his office was the same as their office; that he, Shaffer, had a sixteenth interest in the Steber lease, although it was never delivered to him. He further testified that he saw a statement of the invoice on the Steber well, and that it was made out to Shaffer and Toler; that he wasn't concerned with the invoice, and didn't pay much attention to it and didn't send it back. Mr. Shaffer also stated on examination that he didn't know whether Shaffer and Toler had been billed for the work done on Warren No. 2 or not.

E. S. Andrews testified that he was a bookkeeper employed by the defendants; that, in 1942, he was also keeping books for A. H. Gibson in the same office; that he didn't have anything to do with the payment of invoice for the work done on Warren No. 1; that that invoice was paid by Mr. Gibson; that the plaintiff came into the office after the bill was due, and asked about it, and he told him that it was Gibson's bill; that he told McGraw where he could find Gibson at his home and that McGraw went over there. He further testified that he paid the invoice on Warren No. 2 well, signing the check himself for Mr. Gibson; that about ten or fifteen days after the invoice was rendered on the Steber well, McGraw came to the office and asked about it, and that he told him "that these people that he done the work for would, or said they would, send the money to me to pay it, but I didn't know just when, but they had promised it right away." Andrews denied that he had said anything to the effect that Shaffer and Toler would pay the bill.

The sole question presented to the Court is whether the judgment is manifestly against the weight of the evidence.

If the evidence discloses that the contract was made by

the defendants themselves, they, of course, are liable; but if the evidence shows that the defendants did inform the plaintiff of the fact that they were making the contract on behalf of Gibson, then of course they are not liable.

The testimony in this case is conflicting and irreconcilable. The trial court had an opportunity to see the witnesses; to observe their demeanor while testifying, and to weigh the probability or improbability of their testimony. These tests of truthfulness or untruthfulness of testimony often cannot be discerned from the printed record. The law has committed to the trial court, when a cause is tried without a jury, the determination of the credibility of the witnesses and the weight to be accorded to their testimony when the evidence is merely conflicting, and this Court will not substitute its judgment for that of the trial Court. Pippert v. Schiele, 315 App. 563; People v. Sain, 384 Ill. 394.

We find that the record contains no error requiring a reversal of the judgment, and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

## Abstract

FILED
FEB 28 1944
Harold G. Malkus
CLERK OF THE APPELLATE COURT
FIFTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

322 I.A. 75

February Term, A. D. 1944.

Term No. 4302 Agenda 23.

| | |
|---|---|
| ST. LOUIS ENVELOPE COMPANY<br>Plaintiff-Appellee<br>vs.<br>CENTRALIA MUTUAL BENEFIT ASSOCIATION, A corporation<br>Defendant-Appellant | Appeal from the Circuit Court of Marion County, Ill. |

51

STONE, J.

This suit was originally instituted in justice court, by the St. Louis Envelope Company, appellee, (hereinafter designated as plaintiff,) against Centralia Mutual Benefit Association, a corporation, appellant, (hereinafter designated as defendant) on a contract signed by defendant, for the printing of certain envelopes by plaintiff. From a judgment in favor of plaintiff by the justice of the peace, appeal was prosecuted to the Circuit Court of Marion County. Upon a hearing there by the court, without a jury, judgment was entered in favor of plaintiff and against defendant in the sum of $335.86, and costs of suit. From that judgment, defendant prosecutes its appeal to this court.

The error relied upon by defendant for reversal is that the trial court erred in entering judgment against defendant upon an account shown to be due and owing by a separate and distinct corporation.

The record discloses that G. C. Spurgeon, the only witness for defendant, was the president, treasurer and general manager of the Centralia Mutual Benefit Association, defendant herein, and also managing officer and president of another corporation,

known as the Great United Mutual Benefit Association. An order for envelopes was given plaintiff by the Centralia Mutual Benefit Association, some of which were to have the name of defendant printed thereon and some the name of the Great United Mutual Benefit Association thereon.

Defendant received all of the envelopes and bill was sent to it for same. It paid for part of them. It did not return any of the envelopes to plaintiff, nor claim at that time that any other corporation was responsible for the payment of any of the order. It did not object that all of the envelopes ordered were charged to it, until after suit was brought, which was nearly a year after the contract was signed. The party signing a contract without limitation is the party liable, and the party to be made defendant in a suit on the contract. Farley vs. Dean 196 Ill. App. 389; Proctor vs. Wells Bros. Co. 262 Ill. 77; Miers vs. Chas. H. Fuller & Co. 167 Ill. App. 49.

Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, and is bound by it and cannot avoid its obligation or effect by taking a position inconsistent therewith. Beamer vs. Morrison, 210 Ill. 443; Gardner vs. Ladue, 47 id. 211; Interstate Finance Corp. vs. Commercial Jewelry Co. 201 Ill. App. 568. Defendant, on the record was estopped by its conduct from denying its liability. The judgment of the trial court was right and will be affirmed.

AFFIRMED.

Abstract

FILED
FEB 28 1944
David G. Mallott
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1944

Term No. 43027 | Agenda No. 25

322 I.A. 75

| | |
|---|---|
| JOHN J. TREAGER, JR., Executor of the Estate of MATHILDA J. SPOENEMAN TREAGER, Deceased, Plaintiff-Appellant, vs. EUGENE TOTSCH and HUGO HEISLER, Defendants-Appellees. | Appeal from the Circuit Court of St. Clair County. |

STONE, J.

This is a suit on complaint and cognovit filed March 21st, 1940, by plaintiff Mathilda J. Spoeneman Treager, who is now deceased, her executor, John J. Treager, Jr., having been substituted as plaintiff, based on a judgment note and warrant of attorney. On that date, the Circuit Court of St. Clair County entered judgment for $5,027.96 principal and interest and $418.99 for attorney fees, against Eugene Totsch and Hugo Heisler, April 22, 1940, defendants' motion to open the judgment was sustained, judgment opened up, and defendants given leave to plead, the judgment to stand as security. Defendants' motion to dismiss was overruled and defendants filed an answer, and plaintiff given leave to file replication. The case was heard before the Court, and at close of plaintiff's evidence, defendants' motion for judgment was allowed, and judgment was entered in favor of defendants and against plaintiff for costs, from which judgment plaintiff prosecutes his appeal to this court.

We find only one cause stated as error relied upon for reversal, and that is, that the court erred in granting the motion

to set aside the judgment by confession entered March 21, 1940. We find the above allegation under "Points relied upon for reversal of order and judgment of Circuit Court". In his argument counsel for plaintiff several times specifically alleges that the court erred in granting the motion to set aside the judgment by confession. We find no other reason assigned.

Rule 2 of this court provides, "No assignment of errors or of cross-errors shall be necessary, except the statement in the brief, at the conclusion of the statement of the case, of the errors relied upon for reversal, as required in Rule 9." Rule 9 provides, "The concluding sub-division of the statement of the case shall be a brief statement of the errors or of the cross-errors submitted by an appellee not prosecuting a cross-appeal." It is not the duty of the court to search the record for the matters material to the disposition of the contested issues. It is the duty of counsel to prepare such matters so as to present clearly and in an orderly manner, for the consideration of the court, the questions which were presented in the trial court. Village of Barrington Vs. Lageschulte, 323 Ill. 343. A reviewing court may determine whether or not its rules have been substantially complied with, and where there is no attempt to comply with them the appeal will not be entertained. Gyure vs. Sloan Valve Co. 367 Ill. 489.

It necessarily follows therefore, that the only question for the consideration of this court is upon the one error assigned, namely, that the trial court erred in granting the motion to set aside the judgment by confession entered March 21, 1940, and whether the facts alleged in the verified motion to vacate were sufficient to constitute a defense to the note and to the action, and were sufficient in law, for the Court's action in opening up the judgment.

The record discloses, that the note in question was signed "All Electric Bakery, Inc. By Eugene Totsch, Pres. Hugo Heisler,

V. Pres. Attest; Albert Heisler, Sec'y." It is contended on behalf of plaintiff that the record shows that on the date of the execution of the note, May 1, 1935, the All-Electric Bakery, Inc., was not a legally constituted and existing corporation, and that defendants are personally liable. In that regard, the motion of defendants to set aside the judgment alleges that on January 8, 1933, the Sangamon County Circuit Court, upon the complaint of the Attorney General for and in behalf of the People of the State of Illinois, entered a decree dissolving said All Electric Bakery, Inc., for failure to pay certain franchise taxes and fees due to the State of Illinois, which decree was, on May 5, 1937, upon the motion of said Attorney General, set aside and vacated. It also sets forth the fact that on and prior to March 20, 1932, and thereafter until some time in the year 1939, when the corporation was adjudged a bankrupt, the plaintiff was employed by said corporation, during most of the time being a stockholder, officer and director therein, and had knowledge of the fact that said decree of dissolution was entered, and that during all of this time plaintiff took an active part in the management and conduct of the business of the company and that on May 1, 1935, a special directors meeting was called by the plaintiff for the purpose of securing the execution of the note sued upon in this case.

It is a part of the settled public policy of this state, that upon the dissolution of a corporation, no matter how the dissolution may be effected, the corporation shall nevertheless be regarded as still existing for the purpose of settling up its affairs. The Life Association of America vs. Fassett, 102 Ill. 315. The allegation that plaintiff called a special directors meeting for the purpose of securing the execution of this note, is a sufficient allegation of fact, to indicate that plaintiff still regarded the corporation as an existing entity.

It is contended on behalf of plaintiff that the use of

the words, "jointly and severally", in the body of the note is decisive of the meaning of the instrument and imports an individual liability on the part of the signers, and in support of that contention cites the case of Kaspar Amer. State Bank vs. Oul Homestead Ass'n, 301 Ill. App. 326. In that case the note was signed, "Oul Homestead Association, Albert Hornik, Pres. James L. Preisler, Sec'y, James Sican, Treas.;" and the court held that the abbreviations, "Pres." "Sec'y." and "Treas." written after the names of the individual signers were merely descripto personae, and that the individuals were personally liable. In that case it will be noted that there was no word indicating representative capacity. In the instant case the word "by" is used, preceding the names of the signers, indicating that they signed in a representative capacity. In the case of Sharpe vs. Second Baptist Church, 274 Ill. App. 374, it was held that where a judgment note was signed, "Second Baptist Church of Maywood" "by" certain trustees, that the note was executed officially and not individually, and that it was error to confess judgment against the individuals. Cited with approval therein is the case of New Market Sav. Bank vs. Gillet, 100 Ill. 254.

Section 40, Article 1 of the Uniform Negotiable Instrument Law, Chapter 98, Rev. Stat, Ill. 1941 provides, "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized, but the mere addition of words describing him as agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability." In the instant case, defendants did use words indicating that they signed for or on behalf of a principal, and in representative capacity, and there is no contention that they were not the president and vice president, of what was, accoring to the facts set forth in the motion to vacate, a corporation recognized as still functioning by

the plaintiff.

Courts exercise an equitable jurisdiction over judgments entered by confession or warrants of attorney and a motion to open or vacate such a judgment is addressed to the discretion of the court. Lake vs. Cook, 15 Ill. 353; Gillespie vs. Rout, 39 Ill. 274; Fitzgerald vs. Power, 225 Ill. App. 118; Whalen vs. Billings, 104 Ill. App. 281; Goergen vs. Schmidt, 69 Ill. App. 538; Nitsche vs. City of Chicago, 280 Ill. 286; First Nat'l. Bank vs. Galbraith, 271 Ill. App. 240. We do not believe from this record, that the trial court abused that discretion, and hold that the court did not err in setting aside and vacating the judgment. The judgment of the Circuit Court of St. Clair County, will therefore be affirmed.

AFFIRMED.

Abstract

FILED
FEB 28 1944
David G. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

322 I.A. 76

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1944.

General No. 9412

Agenda No. 19

MARGARET COLE,
Plaintiff-Appellant,

-vs-

CARL I. GLASGOW, E. J. HAWBAKER, and F. L. BORTON, Trustee,
Defendants-Appellees.

Appeal from Circuit Court Piatt County, Illinois.

DADY, P. J.

On February 5, 1943, the plaintiff-appellant, Margaret Cole, filed in the circuit court of Piatt County her complaint in chancery consisting of two counts, making the appellees, Glasgow, Hawbaker and Borton, trustee, parties defendant. Thereafter the circuit court entered an order sustaining motions of the defendants to strike the complaint. Plaintiff refused to further plead, and such order then dismissed the suit for want of equity. Plaintiff appeals.

The motions to strike stated twenty specific reasons for the motions. The order sustaining the motions is general and states no specific reason for the granting of the motion. In their reply brief appellees merely argue the case on the merits. Therefore, we believe the only question before us is,- do the facts well pleaded in the complaint state a cause of action?

The complaint is verbose, informal, repetitious, and at places contains an almost unintelligible jumble of words. This makes it difficult to briefly state all of the alleged material facts.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1942.

General No. 9412 Agenda No. 17

MARGARET COLE,
Plaintiff-Appellant,

-vs-

Appeal from
Circuit Court
Piatt County,
Illinois.

CLAUD I. CLAGGETT, E. J. HAWBAKER,
and F. L. BORTON, Trustees,
Defendants-Appellees.

DALY, P. J.

On February 5, 1942, the plaintiff-appellant, Margaret Cole, filed in the circuit court of Piatt County her complaint in chancery consisting of two counts, making the appellees, Claggett, Hawbaker and Borton, trustees, parties defendant. Thereafter the circuit court entered an order sustaining motions of the defendants to strike the complaint. Plaintiff refused to further plead, and such order then dismissed the suit for want of equity. Plaintiff appeals.

The motions to strike stated twenty specific reasons for the motions. The order sustaining the motions is general and states no specific reason for the granting of the motion. In their reply brief appellees merely argue the case on the merits. Therefore, we believe the only question before us is,- do the facts well pleaded in the complaint state a cause of action?

The complaint is verbose, informal, repetitious, and at places contains an almost unintelligible jumble of words. This makes it difficult to briefly state all of the alleged material facts.

We believe the first count of the complaint does sufficiently charge that:

(1) At all of the times in question the plaintiff was and is inexperienced in business matters. At all of such times the defendants Glasgow and Hawbaker were and are attorneys at law. Borton, as trustee, is a necessary but formal party defendant.

(2) On May 28, 1916, Sebastian G. Vrooman, the grandfather of the plaintiff, died owning 160 acres of land, leaving a will by which he devised said real estate by the following language:

> "I hereby give, devise and bequeath unto my son, William S. Vrooman, all the real estate of which I die ceased and possessed for and during the term of his natural life, meaning and intending to hereby give my said son a life estate in all said real estate, and after his death and, if he does not survive me, at my death all said real estate shall vest in fee in the child or children or descendants of child or children who survive him, my said son; provided there be such descendants of a deceased child of my said son such descendants shall take their deceased parents share only, and all children of my said son by any marriage are intended herein."

(3) The son, William S. Vrooman, is living and at the time of the filing of the complaint was aged about 73 years. Five children, including the plaintiff, were born to William S. Vrooman, all of whom are living except Pearl Roberts, who died August 1, 1942.

(4) On October 7, 1932, the father of the plaintiff was indebted to a bank and to evidence such indebtedness on such date delivered to such bank a note signed by him and three of his children, including the plaintiff. The plaintiff was aged fifteen years when she signed said note.

(5) On January 7, 1939, a judgment by confession was entered on said note in favor of the bank and against the plaintiff

We believe the first count of the complaint does sufficiently charge that:

(1) At all of the times in question the plaintiff was and is inexperienced in business matters. At all of such times the defendants Glasgow and Hawbaker were and are attorneys at law. Bottom, as trustee, is a necessary but formal party defendant.

(2) On May 28, 1918, Sebastian C. Vroomen, the grandfather of the plaintiff, died owning 160 acres of land, leaving a will by which he devised said real estate by the following language:

> "I hereby give, devise and bequeath unto my son, William S. Vroomen, all the real estate of which I die seized and possessed for and during the term of his natural life, meaning and intending to hereby give my said son a life estate in all said real estate, and after his death and, if he does not survive me, at my death all said real estate shall vest in fee in the child or children or descendants of child or children who survive him, my said son; provided there be such descendants of a deceased child of my said son such descendants shall take their deceased parents share only, and all children of my said son by any marriage intended herein."

(3) The son, William S. Vroomen, is living and at the time of the filing of the complaint was aged about 72 years. Five children, including the plaintiff, were born to William S. Vroomen, all of whom are living except Pearl Roberts, who died August 1, 1942.

(4) On October 7, 1924, the father of the plaintiff was indebted to a bank and to evidence such indebtedness on such date delivered to such bank a note signed by him and three of his children, including the plaintiff. The plaintiff was aged fifteen years when he signed said note.

(5) On January 7, 1929, a judgment by confession was entered on said note in favor of the bank and against the plaintiff

and one of her sisters for $4013.96.

(6) Thereafter the plaintiff engaged defendant Glasgow as her attorney in connection with protecting her against said judgment. Glasgow prepared and filed a motion, signed by plaintiff, to vacate such judgment. On January 26, 1939, the judgment was found not enforceable against plaintiff and was vacated. Glasgow acted as her attorney in such proceeding.

(7) The reasonable fee of Glasgow for his services in connection with vacating said judgment would have been not to exceed $50; when plaintiff engaged him to so represent her, she told him she had no money with which to immediately pay him, and told him she was aged only fifteen years when she signed said note, and had done nothing to ratify her execution of the note, and had received no consideration for signing the same, and that her father had forced her to sign the note; Glasgow then falsely advised her that because of such judgment she was in very great danger of losing her contingent interest in said real estate, that the litigation in connection with said judgment would likely be of long duration and expensive, and that the risk from a legal standpoint would be uncertain; he also falsely represented to her that the then cash value of her interest in said real estate was only about $30 per acre, whereas the then real value of the entire title to said real estate was about $225 per acre and the then value of the plaintiff's interest was about three times what Glasgow paid for same; believing and relying on such representations of Glasgow, she then orally agreed to give him as his fee 1/4 of the amount of the judgment if the suit was so terminated that she would not be obligated to pay such judgment.

(8) On January 13, 1939, pursuant to such oral argeement, she executed and delivered to Glasgow a deed which purported to

and one of her sisters for $2012.56.

(6) Thereafter the plaintiff engaged defendant Glasgow as her attorney in connection with protecting her against said judgment. Glasgow prepared and filed a motion, signed by plaintiff, to vacate such judgment. On January 23, 1929, the judgment was found not enforceable against plaintiff and was vacated. Glasgow acted as her attorney in such proceeding.

(7) The reasonable fee of Glasgow for his services in connection with vacating said judgment would have been not to exceed $50; when plaintiff engaged him to so represent her, she told him she had no money with which to immediately pay him, and told him she was aged only fifteen years when she signed said note, and had done nothing to ratify her execution of the note, and had received no consideration for signing the note, and that her father had forced her to sign the note; Glasgow then falsely advised her that because of such judgment she was in very great danger of losing her contingent interest in said real estate, that the litigation in connection with said judgment would likely be of long duration and expensive, and that the risk from a legal standpoint would be uncertain; he also falsely represented to her that the then cash value of her interest in said real estate was only about $50 per acre, whereas the then real value of the entire title to said real estate was about $125 per acre and the then value of the plaintiff's interest was about three times what Glasgow paid for same; believing and relying on such representations of Glasgow, she then orally agreed to give him as his fee 1/4 of the amount of the judgment if the suit was so terminated that he would not be obligated to pay such judgment.

(8) On January 14, 1929, pursuant to such oral agreement, she executed and delivered to Glasgow a deed which purported to

convey and warrant to Glasgow "an undivided 1/4 of an undivided 1/5 interest" in the whole of said real estate, the stated consideration being "One Dollar, legal services and other good and valuable consideration," the legal services being the services of Glasgow in having such judgment vacated.

(9) On January 13, 1939, as a part of the consideration for such deed and for such legal services, Glasgow pretended to obtain for plaintiff a loan of $400, and in so doing he and defendant Borton prepared a note and trust deed; the note was for $400 and was payable to plaintiff's order one year after the death of her father with interest at 6% per annum after such death; she then endorsed and delivered such note to Glasgow; the trust deed purported to convey the entire title to said real estate to Borton as trustee to secure payment of such note; plaintiff only received on such note $250 and Glasgow kept the remaining $150; Glasgow or Borton delivered the note to the bank, and thereafter Hawbaker purchased the note from the bank and now holds such note and claims he paid the bank $250 therefor; at the time of purchasing such note Hawbaker knew all of the said facts concerning the execution of such note and knew that plaintiff had received only $150 from the proceeds of such note.

(10) About September 12, 1939, she applied to Glasgow to assist her in procuring a loan on her remaining interest in said premises, and at that time Glasgow falsely advised her it would be to her best interest to sellher remaining 3/4 of 1/5 interest and that he would give her therefor $450, and told her that such sum was more than such remaining interest was worth; believing and relying on him she executed and delivered to him a deed conveying such 3/4 of 1/5 interest to him, and received from him such $450; that in fact her interest in said real estate was then reasonably worth $3,000.

conveyed and warrant to Gilgore "an undivided 1/4 of an undivided 1/3 interest" in the whole of said real estate, the stated consideration being "One Dollar, legal services and other good and valuable consideration," the legal services being the services of Gilgore in having such judgment vacated.

(9) On January 12, 1926, as a part of the consideration for such deed and for such legal services, Gilgore directed to obtain for plaintiff a loan of $400, and in so doing he and defendant Borton prepared a note and trust deed; the note was for $400 and was payable to plaintiff's order one year after the death of her father with interest at 6% per annum after such death; she then endorsed and delivered such note to Gilgore; the trust deed purported to convey the entire title to said real estate to Borton as trustee to secure payment of such note; plaintiff only received on such note $450 and Gilgore kept the remaining $50; Gilgore or Borton delivered the note to the bank, and thereafter Bawbker purchased the note from the bank and now holds such note and claims he paid the bank $350 therefor; at the time of purchasing the note Bawbker knew all of the said facts concerning the execution of such note and knew that plaintiff had received only $450 from the proceeds of such note.

(10) About September 12, 1926, she applied to Gilgore to assist her in procuring a loan on her remaining interest in said premises, and at that time Gilgore falsely advised her it would be to her best interest to sell her remaining 2/3 of 1/3 interest and that he would give her therefor $450, and did her that such sum was more than such remaining interest was worth; believing and relying on him she executed and delivered to him a deed conveying such 2/3 of 1/3 interest to him, and received from him such $450; that in fact her interest in said real estate was then reasonably worth $3,000.

(11) Thereafter Glasgow conveyed by unrecorded deeds his interest in said premises to Hawbaker; before receiving such conveyances from Glasgow, Hawbaker knew all of the facts and circumstances under which Glasgow had obtained such two deeds from plaintiff and of the actual considerations therefor, and knew that in the dealings between plaintiff and Glasgow about said deeds Glasgow was, and was acting as, attorney for plaintiff.

In such first count plaintiff offers to do equity, and asks for reconveyances, for cancellation of the note and release of the trust deed, and for general relief.

Count 2 restates the allegations of Count 1 by reference, and then alleges that:

(1) On December 25, 1931, there was pending in said circuit court a receivership proceeding involving said real estate, to which proceeding the plaintiff was a party; Hawbaker was appointed and acted as her guardian ad litem in such proceeding, and in that way became familiar with the provisions of such will; such proceeding was still pending in 1939, and during all of such time Hawbaker continued to represent her therein.

(2) Pearl's contingent interest in said real estate ceased on her death on August 1, 1942; about August 29, 1942, the plaintiff was requested by Hawbaker to come to his office, which she did, and he thereupon told her he would give her $150 for a deed from her conveying to him the interest which he then falsely alleged she had acquired in said real estate by the death of her sister, Pearl; the plaintiff, believing and relying on the representations of Hawbaker that she had so acquired such an interest, then executed and delivered such deed to Hawbaker and received from Hawbaker $150; in executing such deed she believed she thereby conveyed only the interest which

(ii) Thereafter Glasgow conveyed by unrecorded deeds his interest in said premises to Hawbaker; before receiving such conveyances from Glasgow, Hawbaker knew all of the facts and circumstances under which Glasgow had obtained such co deeds from plaintiff and of the actual consideration therefor, and knew that in the dealings between plaintiff and Glasgow about said deeds Glasgow was, and was acting as, attorney for plaintiff.

In such first count plaintiff offers to do equity, and asks for recovery, for cancellation of the note and release of the trust deed, and for general relief.

Count 2 restates the allegations of Count 1 by reference, and then alleges that:

(i) On December 21, 1921, there was pending in said circuit court a revolving proceeding involving said real estate, to which proceeding the plaintiff was a party; Hawbaker was appointed and acted as our trustee in bankruptcy in such proceeding, and in that way became familiar with the provisions of such will; such proceeding was still pending in 1929, and during all of such time Hawbaker continued to represent our interest.

(ii) Plaintiff's contingent interest in said real estate passed on her death on August 1, 1922; about August 22, 1922, the plaintiff was requested by Hawbaker to come to his office, which she did, and he informed her that he could give her $150 for a deed from her conveying to him the interest which he then falsely alleged she had acquired in said real estate by the death of her father, Frank; the plaintiff, believing and relying on the representations of Hawbaker that she had so acquired such an interest, then executed and delivered such deed to Hawbaker and received from Hawbaker $150; in executing such deed she believed she thereby conveyed only the interest which

she had acquired by the death of her sister Pearl, but has since learned that said deed conveyed all of her interest in said real estate; said deed in ~~part~~ part purported to convey "all interest and any interest which" she, the plaintiff, "may subsequently acquire in" said real estate; said deed was delivered to Hawbaker after he had received the unrecorded deed or deeds to him referred to in Count 1, and plaintiff did not know Hawbaker had acquired such unrecorded deed or deeds until after she had delivered such deed to Hawbaker.

(3) In obtaining such deed Hawbaker did so as a part of a scheme between him and Glasgow to cause her to confirm the conveyances which she had so made to Glasgow.

(4) On December 7, 1942, she tendered to Hawbaker the return of the $150 he had given her for such conveyance, plus interest at seven per cent per annum, and asked for a reconveyance to her of the interest she had conveyed by such deed, but Hawbaker had refused to accept such tender or make such conveyance.

In such second count the plaintiff offers to do equity, and prays for a reconveyance, as well as general relief.

Each count has attached thereto and by reference made a part thereof copies of the instruments therein referred to.

Each count contained other allegations evidently intended to anticipate a defense or defenses, but we consider such allegations as immaterial on the question of whether the complaint stated a cause of action,- so we will ignore such other allegations.

It will be noted that the first count in substance charges the following: That Glasgow obtained the first deed while acting as the plaintiff's attorney; that at the same time he also received from her $150 through the $400 loan secured by the trust deed; that the deed and $400 loan were a part of the same transaction;

she had acquired by the death of her sister Pearl, but she since learned that said Pearl conveyed all of her interest to said real estate, said land in ~~[illegible]~~ Pearl purported to convey "all interest and my interest whatsoever", the plaintiff, "by substantially accurate and" said real estate said deed was delivered to Davidson after he had received the unrecorded deed or deeds to his relatives in Count L, and plaintiff did not know Davidson had recorded such unrecorded deed or deeds until after the had delivered such deed to Davidson.

(3) In consideration such deed Davidson did so as a part of a scheme between him and Dickson to cause her to confirm the conveyances which she was so made to Dickson.

(4) On December 7, 1945, she telegraph to Davidson the return of the $150 he had given her for such conveyance, plus interest at seven per cent per annum, and asked for a reconveyance to her of the interest she had conveyed by such deed, but Davidson had refused to accept such tender or make such conveyance.

In each second count the plaintiff offers to do equity, and asks for a reconveyance, as well as general relief.

Each count has all good tendency and by reference made a part thereof equity of the instrument therein referred to.

Each count contains other allegations evidently intended to anticipate a defense or defense, but we consider such allegations as immaterial on the question of whether the complaint states a cause of action,- so we will ignore such other allegations.

It will be noted that the first count is substantially the following: That Dickson obtained the first deed while acting as the plaintiff's attorney; that at the same time he also received from her $150 through the $400 loan secured by the trust deed; that the deed and $400 loan were a part of the same transaction;

that in obtaining such deed he falsely advised her that she was in great danger of losing her interest in the real estate by reason of the judgment, and that the litigation in connection with relieving her from such judgment would likely be of long duration and expensive; that the sole consideration for the deed and for the $150 which he received from the $400 loan was his legal services in connection with vacating the judgment; that the note on which judgment was taken was executed by plaintiff while under compulsion by her father and at a time when she was a minor, and she so advised Glasgow; that she first consulted Glasgow on January 7, 1939, and nineteen days later the judgment was vacated on her motion.

Being under age and having done nothing to ratify the note, it appears that, regardless of the question of compulsion, plaintiff had the right to disaffirm the note and have the judgment vacated as to her. (See Wright v. Buchanan, 287 Ill. 468, 479; Wuller v. Chuse Grocery Co., ~~248~~ 241 Ill. 398.) Assuming the facts so charged to be true, then the proceedings in connection with the opening of the judgment were almost pro forma, and under such circumstances Glasgow was entitled to only a comparatively small fee for his services. The reasonableness of Glasgow's charges for his services, and the fairness of such transactions, are questions of fact to be determined after a hearing.

The first count further charges, in substance, that in September, 1939, the plaintiff applied to Glasgow for assistance in getting her a loan; he then falsely advised her that it would be to her best interest to sell her remaining interest to him for $450, telling her that was more than her interest was worth, and relying on such advice the plaintiff made a second conveyance for $450 although such interest was then reasonably worth $3,000.

that in entertaining such doubt be falsely advised that she was in great danger of losing her interest in the real estate by reason of the judgment, and that the litigation in connection with relieving her from such judgment would likely be of long duration and expensive; that the sole consideration for the deed and for the $150 which is received from the $400 loan was the legal services in connection with vacating the judgment; that the note on which judgment was taken was executed by plaintiff while under coercion by her father and at a time when she was a minor, and she so informed Gilmore; that the first consulted Gilmore on January 7, 1929, and nineteen days later the judgment was vacated on her motion.

Held, under the facts and having regard to plaintiff's age, it appears that, regardless of the question of coercion, plaintiff had the right to disaffirm the note and have the judgment vacated as to her. (See Ralph v. Bunch 267 Ill. 488, 492; Miller v. Chase Brewer Co., 242 Ill. 348.) Assuming the facts to be conceded to be true, then the proceedings in connection with the opening of the judgment were without any fraud, and under such circumstances Gilmore was entitled to only a reasonable amount for his services. The reason therefor of disproportionate charges for his services, and the fairness of such transactions, are questions of fact to be determined after a hearing.

The first count of the complaint, in substance, that in October, 1928, the plaintiff applied to Gilmore for assistance in getting her a loan; at that time plaintiff's interest was worth to her legal interest to sell her interest subject to his for $450, telling her that she was sure that her interest was worth, and relying on such advice the plaintiff made a second conveyance for $650 although such interest was then reasonably worth $2,000.

Assuming the foregoing alleged facts to be true, we believe that at all of the times in question a fiduciary relationship existed between Glasgow and the plaintiff, and that the burden rests on him to show that such transactions were fair and equitable. (See In Re Goodman, 377 Ill. 578; Ringen v. Ranes, 263 Ill. 11; Children's Home v. Andress, 380 Ill. 452.) In the Children's Home case, 380 Ill. 452, 465, the court said: "It is settled law that courts of equity will not set any bounds to the facts and circumstances out of which a fiduciary relationship may spring. It includes not only all legal relations such as guardian and ward, attorney and client, principal and agent and the like, but it extends to every possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other. * * * The relationship need not be legal but it may be either moral, social, domestic or merely personal. * * * To establish a fiduciary relationship by parol evidence the proof must be clear, convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion. * * * Such relationship being established the burden is on one benefitting by the transfer of property to show that it was procured fairly and without the exercise of undue influence."

As to Hawbaker, assuming, as we are required to do, that at the time of receiving the unrecorded deeds referred to he knew of the foregoing admitted facts, as charged, ~~in the first count,~~ then it follows that he is in no better position than Glasgow.

The second count in substance charges that Hawbaker on August 29, 1942, through having theretofore acted as guardian ad litem and attorney, was familiar with the title to said real estate, and knew what had transpired theretofore in the plaintiff's dealings with

Assuming the foregoing alleged facts to be true, we believe that at all of the times in question a fiduciary relationship existed between Gregory and the plaintiff, and that the courts rightly so ruled to show that such transactions were fraudulent and void. (See In re Goldman, 277 Ill. 570; Hunter v. Hunter, 201 Ill. 11; Guildersleeve v. Landers, 200 Ill. 18.) In the Guildersleeve case, 200 Ill. 21, 26, the court said: "It is settled law that courts of equity will, on all the forms of the legal and circumstances out of which a fiduciary relationship may spring. It includes not only all legal relations such as parent and child, attorney and client, principal and agent and the like, but it extends to every possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other. * * * The relationship need not be legal but it may be either moral, social, domestic or merely personal. * * * To establish a fiduciary relationship by moral evidence the proof must be clear, convincing and so strong, unequivocal and unalterable as to lead to but one conclusion. * * * Such relationship being established the burden is on the beneficiary of the transfer of property to show that it was procured fairly and without the exercise of undue influence."

As to Hawkins, it seems, as we are required to do, that at the time of rendering the unconscionable deals referred to in the of the foregoing undisputed facts, he charged ~~[illegible]~~ then it follows that he is in no better position than Gregory.

The second count in substance charges that Hawkins on January 22, 1926, through having transactions which he purchased as filing and attorney, was fraudulently with the intent to sell real estate, and knew that the transferor Gregory is the plaintiff's dealings with

Glasgow, and on such date requested her to come to his office, which she did. He then advised her that she had acquired an interest in said real estate because of the death of her sister Pearl, and that he would give her $150.for such interest; relying on such representations, the plaintiff executed and delivered to Hawbaker a deed prepared by him, and he then paid her the $150; she afterwards learned that instead of merely thereby conveying an interest alleged to have been acquired by her through the death of her sister Pearl, the deed in fact conveyed all her interest in said real estate; in obtaining such deed Hawbaker was colluding with Glasgow.

It is our opinion that the second count also alleged a cause of action against Hawbaker.

As to the $400 note, Hawbaker contends that inasmuch as the bank which first made the $400 loan was a bona fide holder, and Hawbaker having purchased the note from the bank, it follows that he acquired all of the rights of the bank as a bona fide holder. In support of this contention he cites Mann v. M.L. & T.Co., 100 Ill. App. 224, and Anderson Nat. Bank v. Jacobson, 305 Ill. App. 169. An examination of these cases shows that the there plaintiff was a bona fide holder. In the present case the motion to strike admits that Hawbaker knew all of the defects at the time he acquired the note. Therefore, assuming such alleged defects to be true, he is not a bona fide holder.

It appears that prior to starting the present suit, and on July 7, 1942, the plaintiff filed a chancery proceeding in the same court against Glasgow and Hawbaker, as defendants, the complaint in such suit being based on some, if not all, of the charges on which the present complaint is based. On November 7, 1942, an order was entered by such court ordering that such first suit be dismissed on motion of the plaintiff. On December 17, 1942, the court denied a motion of the plaintiff to reinstate such former suit.

Glasgow, and on such date requested her to come to his office, which she did. He then advised her that she had acquired an interest in said real estate because of the death of her sister Pearl, and that he would give her $150.for such interest; relying on such representation, the plaintiff executed and delivered to Hawbaker a deed prepared by him, and he then paid her the $150: she thereafter learned that instead of merely thereby conveying an interest claimed to have been acquired by her through the death of her sister Pearl, the deed in fact conveyed all her interest in said real estate; in obtaining such deed Hawbaker was colluding with Glasgow.

It is our opinion that the second count also alleged a cause of action against Hawbaker.

As to the $400 note, Hawbaker contends that transaction as the bank which first made the $400 loan was a bona fide holder, and Hawbaker having purchased the note from the bank, it follows that he acquired all of the rights of the bank as a bona fide holder. In support of this contention he cites Kan v. M.L. & T.Co., 100 Ill. App. 164, and Nat. Bank v. Jacobson, 205 Ill. App. 129. An examination of these cases shows that the there plaintiff was a bona fide holder. In the present case the motion to strike admits that Hawbaker knew all of the defects at the time he acquired the note. Therefore, assuming such alleged defects to be true, he is not a bona fide holder.

It appears that prior to starting the present suit, and on July 7, 1944, the plaintiff filed a chancery proceeding in the same court against Glasgow and Hawbaker, as defendants, the complaint in such suit being based on some, if not all, of the charges on which the present complaint is based. On November 7, 1944, an order was entered by such court ordering that such first suit be dismissed on motion of the plaintiff. On December 17, 1944, the court denied a motion of the plaintiff to reinstate such former suit.

One of the grounds of the motion to strike in the present case was that such dismissal of the former suit was res adjudicata in the present proceeding. Although such former proceedings were not offered in evidence by defendants on the hearing of the motion to strike in the present proceeding, the trial court, on its own motion, ordered that such former proceedings be made a part of the proceedings on the motion to strike in the present case. Defendants now argue that such dismissal is res adjudicata. In so doing defendants have assumed that such dismissal is res adjudicata, and in so doing have cited several authorities on the effect of res adjudicata, but neither side has cited any authority whatever on the legal effect of such a dismissal.

In Hitchcock v. Hitchcock, 373 Ill. 352, 356, the court said: "Nor is there merit to appellant's contention that the overruling of her motion to dismiss the complaint on the ground of res adjudicata was error. The record shows, without contradiction, that the dismissal of appellee's first bill for divorce was on his motion, before any evidence was heard. It is the rule in this State that a plaintiff may, on his own motion, dismiss his complaint at any time before trial or hearing, provided no cross-complaint or counter-claim has been filed. * * * The dismissal before the hearing of evidence or the filing of a cross-bill amounted to dismissal without prejudice." This case fully disposes of appellee's contention that the prior proceedings are res adjudicata in the present suit.

For the reasons indicated the judgment of the trial court is reversed, and this cause is remanded to the trial court with directions to deny the motions to strike and for further proceedings consistent with this opinion.

Reversed and remanded with directions.

One of the grounds of the motion to strike in the instant case is that such dismissal of the former suit was *res adjudicata* in the present proceeding. Although such former proceedings were not offered in evidence by defendants on the hearing of the motion to strike in the present proceeding, the trial court, on its own motion, ordered that such former proceedings be made a part of the proceedings on the motion to strike in the present case. Defendants now argue that such dismissal is *res adjudicata*. In so doing defendants have assumed that such dismissal is *res adjudicata*, and in so doing have cited several authorities as the effect of *res adjudicata*, but neither side has cited any authority whatever on the legal effect of such a dismissal.

In *Kitchens v. Kitchens*, 279 III. 344, 349, the court said: "We is there merit to appellant's contention that the overruling of her motion to dismiss the complaint on the ground of *res adjudicata* was error. The record shows, without contradiction, that the dismissal of appellee's first bill for divorce was on his motion, before any evidence was heard. It is the rule in this State that a plaintiff may, on his own motion, dismiss his complaint at any time before trial or hearing, provided no cross-complaint or counter-claim has been filed. * * * The dismissal before the hearing of evidence or the filing of a cross-bill amounted to dismissal without prejudice." This case fully discusses of appellee's contention that the prior proceedings are *res adjudicata* in the present suit.

For the reasons indicated the judgment of the trial court is reversed, and this cause is remanded to the trial court with directions to deny the motions to strike and for further proceedings consistent with this opinion.

Reversed and remanded with directions.

Abstract

322 I.A. 76

General ~~number~~ No. 9392. Agenda ~~number~~ No. 3.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A.D. 1944.

| | |
|---|---|
| MARY E. HACKETT, | APPEAL FROM THE CIRCUIT COURT |
| Plaintiff - Appellee, | OF PIKE COUNTY. |
| -vs- | |
| GLENN HICKS, GERTRUDE McCONNELL, ROBERT HICKS, JAMES HICKS, et al., | ~~HONORABLE A. CLAY WILLIAMS,~~ |
| Defendants- Appellants. | ~~Judge Presiding.~~ |

1073A

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HAYES, J.:

Agnes M. Tippets died May 5, 1941 in Pike County Illinois and shortly thereafter her purported last will and testament was admitted to probate by the County Court of that County. On February 25, 1942 Mary E. Hackett filed her complaint in the Circuit Court of Pike County to contest the validity of the will. The original complaint alleged that the testatrix was mentally incompetent and had been subjected to undue influence at the time her will was executed. On June 9, 1942 Mary E. Hackett filed a motion to amend her complaint to allege that the purported will was not attested by two credible witnesses in the presence of the testatrix. On June 30, 1942 after arguments by counsel on both sides the court permitted the amendment. The issue of the validity of the will, which was only one of the issues in the proceeding was tried before a jury on November 23, 1942. The jury returned a verdict

General Number 9192. Agenda Number 3.

IN THE APPELLATE COURT

OF ILLINOIS

SIXTH DISTRICT

ROCKFORD, A.D., 1944.

| | |
|---|---|
| ALBERT E. WALTERS, | APPEAL FROM THE CIRCUIT COURT |
| Plaintiff - Appellee, | OF STEPHENSON COUNTY. |
| -vs- | |
| ALBERT HUNDS, CONSTANCE CO-COMMITTEE, GEORGE COOPER, JOHN HUNDS, et al., | |
| Defendants- Appellants. | Hon. Joseph Stratton, Judge presiding. |

HEDIN, J.:

Jacob E. Tiggins died May 5, 1941 in Pike County, Illinois and shortly thereafter his purported last will and testament was delivered to the County Court of said County. On February 23, 1942 Mary E. Walters filed her petition in the Circuit Court of Pike County to contest the validity of the will. The original complaint alleged that the testatrix was mentally incompetent and was then subjected to undue influence at the time the will was executed. On June 9, 1942 Mary E. Walters filed a motion to amend her complaint to allege that the purported will was not attested by two credible witnesses in the presence of the testatrix. On June 30, 1942 after arguments by counsel on both sides the court granted the amendment. The issue of the validity of the will, being the only one of the issues in the pleadings was tried before a jury on November 23, 1942. The jury returned a verdict

in favor of the defendants and answered affirmatively a special interrogatory asking whether the purported will was attested in the presence of Agnes M. Tippets by two or more credible witnesses.

Mary E. Hackett filed her motion to set aside the verdict, and for a new trial alleging that the verdict was against the law and the evidence, was contrary to the manifest weight of the evidence, and that the court erred in giving certain instructions requested by the defendants and in refusing certain instructions requested by her. On February 16, 1943 the court entered an order setting aside the verdict of the jury and awarding a new trial. Defendants filed their petition in this court for leave to appeal, which petition was allowed on August 14, 1943. The case is now before us on appeal.

An order sustaining a motion for a new trial is not a final order and prior to the enactment of the Civil Practice Act such an order was not appealable. Section 77 of the Practice Act now permits a dissatisfied litigant to petition the Appellate Court to review an order granting a new trial and Rule 30 of the Supreme Court and our Rule 3 set up the manner in which such an appeal may be obtained. Even when leave to appeal is granted, however, we will not disturb the judgment of the trial court unless it is clearly erroneous. Lepkowski v. Laukemper, 317 Ill. App. 304.

The principal issue before the jury in the present case was whether the witnesses to Mrs. Tippets' purported will signed that document in her presence. In our judgment, Mary Hackett established by a preponderance of the evidence that Mrs. Tippets signed her will in her bedroom in the

in favor of the defendants and answered affirmatively a special interrogatory asking whether the purported will was attested in the presence of Agnes K. Tippets by two or more credible witnesses.

Mary A. Hackett filed her motion to set aside the verdict, and for a new trial alleging that the verdict was against the law and the evidence, was contrary to the manifest weight of the evidence, and that the court erred in giving certain instructions requested by the defendants and in refusing certain instructions requested by her. On February 10, 1943 the court entered an order setting aside the verdict of the jury and granting a new trial. Defendants filed their petition in this court for leave to appeal, which petition was allowed on August 14, 1943. The case is now before us on appeal.

An order sustaining a motion for a new trial is not a final order nor prior to the amendment of the Civil Practice Act appealable. Section 77 of the Practice Act now provides a dissatisfied litigant to petition the appellate court to review an order granting a new trial and while 30 or less days have elapsed since the order was entered in which to file a petition for leave to appeal. Even when leave to appeal is granted, however, we will not disturb the judgment of the trial court unless it is clearly erroneous. Lapowski v. Lawlessner, 317 Ill. App. 324.

The principal issue before the jury in the present case was whether the signature to Mrs. Tippets' purported will signed that document in her presence. In her judgment, Mary Hackett contended that the testimony of the witnesses that Mrs. Tippets signed her will in their presence in the

presence of three witnesses; that the witnesses then left the bedroom and signed the will in an adjoining living room and that the archway between the bedroom and living room was hung with heavy draperies which were drawn together. Under these circumstances, we are convinced that Mrs. Tippets' will was witnessed out of her presence. While the possibility exists, as defendants insist, that Mrs. Tippets arose from her bed and watched the witnesses signing the will through the draperies in the archway, no proof was offered that even suggests that she did so. In the absence of such proof, we believe the obvious inference from plaintiff's evidence that Mrs. Tippets remained in bed where she could not observe the witnesses to her will, remains unchallenged. While the formal attestation clause in the will established prima facie that each of the witnesses signed the will in Mrs. Tippets' presence and in the presence of each other and must be overcome by clear evidence to the contrary, we believe that Mary Hackett has sustained this burden of proof. In any event, the trial judge in so holding did not abuse his discretion and his judgment will be sustained. Parke v. Lopez, 306 Ill. App. 486; Carter v. Geeseman, 303 Ill. App. 280; Gavin v. Keter, 278 Ill. App. 308.

We have not reviewed the ruling of the trial court permitting Mary E. Hackett more than nine months after the will was admitted to probate to amend her complaint to allege as an additional ground for declaring the Tippets will invalid that it was not properly witnessed. Defendants insist that the amendment attempted to create a new cause of action and is therefore barred by the limitation on will contests

presence of trained witnesses; that the witnesses then left the bedroom and signed the will in the adjoining living room and that the archway between the bedroom and living room was hung with heavy draperies which were drawn together. Under these circumstances, we are satisfied that Mrs. Tippets' will was witnessed in her presence. While the possibility exists, as Mr. Justice Smith, that Mrs. Tippets came from her bed and entered the witnesses signing the will through the draperies in the archway, no proof was offered that she was able to do so. In the absence of such proof, we believe the obvious inference from plaintiff's evidence that Mrs. Tippets remained in bed where she could not observe the witnesses to her will, remains unchallenged. While the formal attestation clause in the will established prima facie that each of the witnesses signed the will in Mrs. Tippets' presence and in the presence of each other and that to overcome by clear evidence to the contrary, we believe that Mary Bennett has sustained this burden of proof. In any event, the trial judge in his ruling did not abuse his discretion and his judgment will be sustained. Pardo v. Lopez, 305 Ill. App. 496; Carter v. Gossman, 307 Ill. App. 280; Davis v. Ikner, 272 Ill. App. 344.

We have not reviewed the ruling of the trial court permitting Mary E. Wackett more than nine months after the will was admitted to probate to amend her complaint to allege as an additional ground for declaring the Tippets will invalid that it was not properly witnessed. Defendants insist that the amendment attempted to create a new cause of action and is therefore barred by the limitation on will contests

contained in the Statutes. Ill. Rev. Statutes 1943 Chapter 3, Section 242. This, however, is a question of pleading and it is well established that a motion for a new trial raises only questions of law and fact involved in the trial itself. We therefore cannot consider the alleged error of the trial court in permitting the amendment. Scott v. Freeport Motor Casualty Company, 310 Ill. App. 421; Cella v. C. & W. I. R. R. Co., 217 Ill. 326.

The order of the Circuit Court of Pike County setting aside the verdict of the jury in this case and awarding a new trial is therefore affirmed.

JUDGMENT AFFIRMED.

contained in the statutes. Ill. Rev. Statutes 1943 Chapter 3, Section 246. This, however, is a question of pleading and it is well established that a motion for a new trial raises only questions of law and not involved in the trial itself. Therefore cannot consider the alleged error of the trial court in permitting the amendment. Lacey v. Freeport Motor Casualty Company, 110 Ill. App. 421; Tolin v. C. & W. I. R. R. Co., 217 Ill. 320.

The order of the Circuit Court of Cook County setting aside the verdict of the jury is hereby made and awarding a new trial is therefore affirmed.

JUDGMENT AFFIRMED.

Abstract

322 I.A. 77

General ~~number~~ No. 9404. Agenda ~~number~~ No. 12.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A.D. 1944.

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|---|---|
| JUANITA GROTFELDT, Plaintiff-Appellant, | APPEAL FROM THE CIRCUIT COURT OF CHAMPAIGN COUNTY. |
| -vs- | |
| WILLIAM F. GROTFELDT, Defendant-Appellee | ~~HONORABLE FRANK B. LEONARD, Judge Presiding.~~ |

1053
2 76

HAYES, J.:

This is an action for divorce brought by Juanita Grotfeldt against William F. Grotfeldt, on the grounds of extreme and repeated cruelty. The record discloses that they were married on the thirteenth day of August, 1940 and resided together intermittently until the first day of March, 1942. Their marital relationship was quite stormy. In her complaint, plaintiff charges defendant with beating her on numerous occasions which occurred in her own home and in public places. She testified to this on the witness stand,--all of which defendant denied. It appears from the evidence that both plaintiff and defendant went to taverns and drank together, and on other occasions went separately. It is a fair deduction from the record that the defendant drank excessively and would become irritable and quarrelsome. It further appears from the record that the plaintiff was not of the sweetest disposition and frequently irritated the defendant; that she was inclined to be unduly jealous,

Docket No. 9404. Docket No. 12.

IN THE SUPREME COURT

OF MICHIGAN

FIRST DIVISION

Argued May 7, A.D. 1944.

| | |
|---|---|
| MARITA CROSFIELD, | APPEAL FROM THE WAYNE COUNTY |
| Plaintiff-Appellant, | CIRCUIT COURT. |
| -vs- | |
| WILLIAM F. CROSFIELD, | |
| Defendant-Appellee | |

MAIN, J.:

This is an action for divorce brought by Marita Crosfield against William F. Crosfield, on the grounds of extreme and repeated cruelty. The record discloses that they were married on the fifteenth day of August, 1940 and resided together intermittently until the first day of March, 1942. Their marital relationship was quite stormy. In her complaint, plaintiff charges defendant with beating her on numerous occasions which occurred in her own home and in public places. She testified to this on the witness stand,--all of which defendant denied. It appears from the evidence that both plaintiff and defendant went to taverns and drank together, and on other occasions went separately. It is a fair deduction from the record that the defendant drank excessively and would become irritable and quarrelsome. It further appears from the record that the plaintiff was not of the meekest disposition and frequently irritated the defendant; that she was inclined to be unduly jealous,

and that her parents were much opposed to her living with the defendant. She was torn between a desire to live with her husband and go back and forth to her parents, which led to trouble between the plaintiff and the defendant.

Defendant testified that on a number of occasions she tore the shirt from his back, scratched him on the neck and hands until she drew blood and hit him over the head with a beer bottle while in a tavern, which injury necessitated a dressing of adhesive tape. There is very little corroboration for either side's testimony on these several acts of misconduct. The chancellor found that the plaintiff in her eagerness to establish her charge against the defendant was guilty of exaggeration, and that she impeached herself by making different statements of her husband's acts at different times while she was on the witness stand. The Chancellor further found that defendant was more worthy of belief than plaintiff.

Although it appears that defendant did considerable drinking and on two evenings was arrested and put in jail, it also appears that he was an industrious worker; that he contributed to plaintiff's support within his means, and that he had considerable affection for her and for the baby. Plaintiff testified that defendant was chasing other women and constantly showed ill-will towards her, but it appears from the record that he was much opposed to the divorce and hired a lawyer to contest it.

The Chancellor who heard this case and saw the witnesses while testifying was best qualified to judge the weight to be given their testimony and in view of the irreconcilable conflict in the testimony we are not in a position to say that his findings were against the manifest weight

and that her parents were much opposed to her living with the defendant. She was torn between a desire to live with her husband and go back and forth to her parents, which led to trouble between the plaintiff and the defendant.

Defendant testified that on a number of occasions she tore the shirt from his back, scratched him on the neck and hands until she drew blood and hit him over the head with a beer bottle while in a tavern, which injury necessitated a dressing at a doctor's office. There is very little corroboration for either side's testimony on these several acts of misconduct. The examiner found that the plaintiff in her eagerness to establish her charge against the defendant was guilty of exaggeration, and that she knowingly lied in regard to certain statements of her husband's and in different times while she was on the witness stand. The examiner further found that defendant was more worthy of belief than plaintiff.

Although it appears that defendant did considerable drinking and on two occasions was arrested and put in jail, it also appears that he was an industrious worker; that he contributed to plaintiff's support while she became, and that he had considerable affection for her and for the baby. Plaintiff testified that defendant was chasing other women and constantly showed ill-will towards her, but it appears from the record that he was much opposed to the divorce and hired a lawyer to contest it.

The Chancellor who heard this case had seen the witnesses while testifying and was best qualified to judge the weight to be given their testimony and in view of the irreconcilable conflict in the testimony we are not in a position to say that his findings were erroneous and contrary to the

of the evidence.

The decree of the Circuit Court of Champaign County is hereby affirmed.

DECREE AFFIRMED.

of the evidence.

The decree of the Circuit Court of Chesapeake County is hereby affirmed.

Decree affirmed.

Abstract

General ~~number~~ No 9411. Agenda ~~number~~ No. 18.

322 I.A. 702

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A.D. 1944.

| | | |
|---|---|---|
| WILLIAM S. VROOMAN, Plaintiff — Appellant, | : | APPEAL FROM THE CIRCUIT COURT OF PIATT COUNTY. |
| -vs- | : | |
| E. J. HAWBAKER, Defendant — Appellee, | : | ~~HONORABLE C. Y. MILLER, Judge Presiding.~~ |

1063

377

HAYES, J.:

On February 6, 1943, William S. Vrooman filed his complaint in the Circuit Court of Piatt County, Illinois against E. J. Hawbaker. The latter filed a motion to strike the complaint which was sustained, and Vrooman has appealed to this court.

The complaint is lengthy and repetitious, containing many conclusions of the pleader, but in substance alleges: that Vrooman inherited a life estate in 142 acres of land under the will of his father; that on December 28, 1931, Hawbaker, the defendant here who is a lawyer, was appointed guardian ad litem in the case of Buchanan, et al., v. William S. Vrooman, cause number 2773 in the Circuit Court of Piatt County and as a result of such appointment became familiar with the will of Vrooman's father and the interest that Vrooman acquired thereunder; that on February 16, 1934 Vrooman obtained professional advice from Hawbaker concerning the lien of a judgment in the sum of $2,948.08 entered against Vrooman and

General Docket 9411. No. Appeal Docket 16. No.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

September Term, A.D. 1941.

WILLIAM G. TROXEMAN,

Plaintiff - Appellant,

-vs-

E. J. HEWBAUER,

Defendant - Appellee.

APPEAL FROM THE CIRCUIT COURT

OF PLATT COUNTY.

HAYES, J.:

On February 6, 1943, William G. Troxeman filed his complaint in the Circuit Court of Platt County, Illinois against E. J. Hewbauer. The latter filed a motion to strike the complaint which was sustained, and Troxeman has appealed to this court.

The complaint is lengthy and repetitious, contrary to the very admonition of the pleader, but in substance alleges: that Troxeman bequeathed a life estate in his estate to Ann Hewbauer by virtue of his father; that on December 12, 1931, Hewbauer, the defendant herein, was in a trance, and spiritual communion had taken in the case of Hewbauer, et al., v. William G. Troxeman, cause number 2773 in the circuit court of Platt County; and as a result of such communion caused Hewbauer to conflict with the will of Troxeman's father and the Hewbauers sued Troxeman wrongfully thereafter; that on February 10, 1934 Troxeman obtained professional advice from Hewbauer concerning the law of a judgment in the sum of $2,540.00 entered against Troxeman and

others in the Circuit Court of Piatt County, and that on said date, "Hawbaker was engaged to look after the legal interest of the said plaintiff in the premises, which he undertook to do;" that on February 16, 1939, Vrooman employed Hawbaker to resist the appointment of a receiver in supplemental proceedings in Buchanan v. Vrooman, supra; that on January 3, 1940 Hawbaker purchased the judgment against Vrooman referred to above, caused an execution to be issued and service made and sold the interest of Vrooman in the 142 acre farm, purchased that interest himself and obtained a Sheriff's deed after the period of redemption; that after the service of the writ of execution but before sale Vrooman consulted with Hawbaker and was advised that his homestead estate and personal property would not be sold; that Vrooman was an uneducated man, 73 years of age, and relied upon Hawbaker as his attorney and counselor. In conclusion Vrooman prayed that Hawbaker be compelled to account for all rents, issues and profits that he obtained from the real estate since the date of the Sheriff's deed receiving credit for money lawfully expended by him by way of taxes, improvements, etc. and to pay the balance to plaintiff; that the court further enter a decree declaring all interest in the farm acquired by Hawbaker to be held in trust for Vrooman and that Hawbaker be ordered to execute a good and sufficient deed of the premises to Vrooman.

It is obvious that plaintiff here seeks first to impress a trust on the life interest in the farm that Hawbaker acquired by the Sheriff's deed and to compel its reconveyance. Any relief by way of accounting must await a favorable decision on this issue. Thus a freehold is

where in the circuit court of Pike County, and that on said date, Townsend was engaged to look after the legal interest of the said plaintiff in the premises, which he undertook to do;" that on February 16, 1924, Townsend employed Newbauer to assist the plaintiff in a replevin in supplemental proceedings in Madison v. Thomas, alleging that on January 3, 1920 defendant purchased the judgment against Thomas referred to above, without an assignor to be issued and service made and said the defendant of Thomas in the last case here, pretended that Townsend already had obtained a Sheriff's deed after the period of redemption; that after the service of the writ of execution but before said Thomas conferred with Newbauer and was advised that the homestead exemption and personal property could not be sold; that Thomas was an unmarried man, 72 years of age, and relied upon Newbauer as his attorney and counselor. In conclusion Thomas prayed that Newbauer be compelled to account for all rents, issues and profits and be enjoined from the said matter since the date of the Sheriff's deed requiring credit for same; Sheriff's expenses in his by way of taxes, improvements, etc. and to pay the balance to plaintiff; that the court further enter a decree declaring all interest in the land acquired by Newbauer to be held in trust for Thomas and that Newbauer be ordered to execute a good and sufficient deed of the premises to Thomas.

It is obvious that plaintiff here seeks first to impress a trust on the life interest in the farm that Newbauer acquired by the Sheriff's deed and to compel its reconveyance. Any relief by way of accounting must result a favorable decision on this issue. Thus a fraudulent

directly involved and the appeal should have been taken directly to the Supreme Court. Ill. Rev. Stats. 1943, Ch. 110, Sec. 75; Lehmann v. Rothbarth, 111 Ill. 185. We must therefore transfer this cause to the Supreme Court under the provisions of Section 86 of the Civil Practice Act. Ill. Rev. Stat., 1943, Ch. 110, Sec. 210.

The Clerk of this court is directed to transmit the transcript and all files herein to the Clerk of the Supreme Court of Illinois.

CAUSE TRANSFERRED.

directly involved and the appeal should also have been taken directly to the Supreme Court. Ill. Rev. Stats. 1943, Ch. 110, Par. 77; Lohmann v. Hollweck, 111 Ill. 143. We have clarified treatment this course to the Supreme Court under the provisions of Section 69 of the Civil Practice Act. Ill. Rev. Stat., 1943, Ch. 110, Sec. 210.

The clerk of this court is directed to immediately the transcript and all files herein to the clerk of the Supreme Court of Illinois.

ORDER TRANSFERRED.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Gen. No. 9403

Agenda No. 11

322 I.A. 78

C. E. SIEGLE,

Plaintiff-Appellee,

v.

V. A. PIERCE,

Defendant-Appellant.

Appeal from the Circuit Court of Pike County Illinois.

41
108 2/4

RIESS, J.:

A suit in replevin for recovery of a "baby grand piano" was filed in a Justice of the Peace Court by C. E. Siegle, Plaintiff-Appellee herein, against V. A. Pierce, Defendant-Appellant, and after trial and judgment therein, the case was appealed to the Circuit Court of Pike County and there tried de novo by the Presiding Judge without a jury, resulting in a decision in favor of the Plaintiff-Appellee, Siegle, as owner, in whose favor judgment for possession of the piano in controversy and for costs of suit was entered. Defendant Pierce has appealed from that judgment, assigning several errors, some of which we will briefly discuss herein.

The evidence showed in substance that the piano in question had been purchased by and was owned by Appellee Siegle; that he had subsequently placed the same for sale with the "Home Furnishers" in Pittsfield, but that no purchaser was procured; that he then moved the piano to the Cardinal Inn, a restaurant owned and conducted by one Donald Claus, under a verbal arrangement whereby Claus was permitted to use the instrument without any return charge for storage thereof; that the instrument was offered to Claus for sale at a price of $200, and later at a price of $150 to him or to any one who would purchase the same; that it was also advertised for sale by Siegle in local papers; that Claus did not purchase it nor was any other buyer found for the piano.

It further appears that on October 1, 1941, after some weeks of negotiation with Claus, the Defendant-Appellant Pierce entered into

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT



| | |
|---|---|
| ...E. BILLIG, Plaintiff-Appellee, | Appeal from the Circuit Court of Pike County, Illinois. |
| v. | |
| ...E. TILLIG, Defendant-Appellant. | |

...1944, d.:

A suit to replevin for recovery of a "baby grand piano" was filed in a Justice of the Peace Court by C. E. Billig, Plaintiff-Appellee herein, against T. A. Tillig, Defendant-Appellant, and after trial and judgment thereon, the case was appealed to the Circuit Court of Pike County and there tried de novo by the Presiding Judge without a jury, resulting in a decision in favor of the Plaintiff-Appellee, Billig, on which, in whose favor judgment for possession of the piano in controversy and for costs of suit was entered. Defendant Tillig has appealed from that judgment, assigning several errors, some of which we will briefly discuss herein.

The evidence showed in substance that the piano in question had been purchased by and was owned by Appellee Billig; that he had unexpectedly placed the same for sale with the "Home Furnishers" in Pittsfield, but that no purchaser was procured; that he then moved the piano to the Overland Inn, a restaurant owned and conducted by one Tennie Clime, under a verbal arrangement whereby Clime was permitted to use the instrument without any rental charge for storage thereof; that the instrument was offered to Clime for sale at a price of $300, and later at a price of $150 to him or to any one who would purchase the same; that it was also advertised for sale by Billig in local papers; that Clime did not purchase it nor was any other buyer found for the piano.

It further appears that on October 1, 1941, after some weeks of negotiation with Clime, the Defendant-Appellant Tillig entered into

an arrangement for the purchase of the restaurant business, fixtures, equipment, supplies and good will thereof from Donald Claus for a consideration of $5000, under the terms of which a bill of sale was drawn up by an attorney at Claus' request on that date and signed by Claus, the vendor, in the presence of Pierce; that the purchase price was paid and the property delivered to Pierce as vendee. As to the above facts, there is no material dispute.

It further appears from the testimony of all parties that Pierce knew of the ownership of the piano by Siegle and that it had been placed in the Claus restaurant premises for sale. Pierce further contended that in conversation between him and Claus, it was understood that the piano was to be included in the property sold; that Claus had claimed the right to sell the same on account of a certain unpaid meal ticket owing from Siegle to Claus, shown on rebuttal to be a balance of $25.00, and that although Pierce knew the piano had belonged to Siegle, he so asserted that it was subsequently agreed that the same, as between him and Claus as agent with power to sell the piano was to be included in the bill of sale. A Mrs. Jex, employee or manager of Pierce's business, in substance corroborated these statements, which were denied by Claus on rebuttal and no evidence of any knowledge or consent by Siegle to such sale or alleged arrangement with Pierce appears in the record. The piano was not mentioned nor were the items of property constituting the restaurant business itemized or enumerated in the bill of sale, which is brief and reads as follows:

"BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, That I, Donald Claus, of Pittsfield, County of Pike and State of Illinois, in consideration of Five Thousand ($5000.00) Dollars to me paid by V. A. Pierce of Pittsfield, Illinois, the receipt of which is hereby acknowledged, hereby grant, sell and transfer unto V. A. Pierce my restaurant business known as "Cardinal Inn" located at No. 109 West Washington Street, Pittsfield, Illinois, together with all equipment, fixtures, trade fixtures and supplies on hand, which are appurtenant to or used in connection with said business and including the name and good will of said business.
And I do hereby warrant the title to the same and agree to give immediate possession to the said V. A. Pierce.
In Witness Whereof, I have hereunto set my hand and seal this 1st day of October, 1941.

DONALD CLAUS (SEAL)".

an arrangement for the purchase of the restaurant business, fixtures, equipment, supplies and good will thereof from Donald Diane for a consideration of $3000, under the terms of which a bill of sale was drawn up by an attorney at Diane' request on that date and signed by Diane, the vendor, in the presence of Pierce; that the purchase price was paid and the property delivered to Pierce as vendee. In the above facts, there is no material dispute.

It further appears from the testimony of all parties that Pierce knew of the ownership of the piano by Angela and that it had been placed in the Diane restaurant premises for sale. Pierce further contended that in conversations between him and Diane, it was understood that the piano was to be included in the property sold; that Diane had claimed the right to sell the same on account of a certain unpaid small claim owing from Angela to Diane, shown on rebuttal to be a balance of $58.00, and that although Pierce knew the piano was delivered to Angela, he so asserted that it was subsequently agreed that the same, as between him and Diane, is subject with power to sell the piano and be included in the bill of sale. A Mr. Jay, employee or manager of Pierce's business, in substance corroborated these statements, which were denied by Diane on rebuttal and no evidence of any knowledge or consent by Angela to such sale or claims arrangement with Pierce appears in the record. The piano was not mentioned nor was the issue of properly separating the restaurant business itemized or mentioned in the bill of sale, which is brief and reads as follows:

"BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, That I, Donald Diane, of Fitzfield, County of Clay and State of Illinois, in consideration of Five Thousand (5000.00) Dollars to me paid by F. A. Pierce of Fitzfield, Illinois, the receipt of which is hereby acknowledged, hereby grant, sell and transfer unto F. A. Pierce my restaurant business known as "Donald Inn" located at No. 101 West Washington Street, Fitzfield, Illinois, together with all equipment, furniture, fixtures and supplies on hand, which are appurtenant to or used in connection with said business and including the good will of said business.

And I do hereby warrant the title to the same and agree to give immediate possession to the said F. A. Pierce.

In Witness Thereof, I have hereunto set my hand and seal this 1st day of October, 1943.

DONALD DIANE (SEAL)".

Appellee Siegle and Mrs. Siegle both testified that on several occasions subsequent to the time of the sale, they went to the Cardinal Inn and ate meals and that while there, Siegle sought to sell the piano to Pierce who stated to them in substance, that he did not wish to buy it, that he had other things which he deemed more necessary to purchase than a piano; that on one occasion Pierce offered to have it tuned and asked that it be left there on the same terms as Claus had used it; that finally, being unable to negotiate a sale of the piano to Pierce, Siegle told him that if he did not buy it, they would remove the piano as they needed it, to which he replied in substance that he would not buy it, that Claus sold it to him and Claus must furnish him that piano or another of equal value if Siegle took the piano. This appears, according to Siegle's testimony, to have been the first time that Pierce claimed any interest as owner or otherwise to the piano. Pierce denied that contention. It was further testified by one Mrs. Bessie Cosgrove, Claus' mother-in-law with whom he had resided, that both prior to the sale and two days thereafter, Pierce came to her home where she was ill in bed and while there was told on both occasions that the piano did not belong to Donald Claus and could not be included or given by him as it belonged to Siegle. This was denied by Pierce. An attorney who was with Pierce on the latter occasion did not testify. Claus also testified in rebuttal that subsequent to the delivery of the bill of sale and property in question, the insurance policy thereon was transferred by the insurance agent Barber from Claus to Pierce; that at that time, Pierce again stated that it would be a nice gesture if he, Claus, bought the Siegle piano and gave it to Pierce but that Claus responded in substance that he had a sick wife and could not afford to do so. The insurance agent, C. A. Barber, corroborated that statement but did not recall whether it happened immediately before, on or after October 1, 1941. It was further contended by Pierce that the only conversation he had with Mr. and Mrs. Siegle at the restaurant subsequent to the sale concerned a request to purchase certain dishes from him but he refused to sell and denied the conversation concerning the piano.

Douglas Slagle and Mr. Slagle both testified that on several occasions subsequent to the time of the sale, they went to the Cardinal Inn and ate meals and that while there, Slagle sought to sell the piano to Pierce who stated to them in substance, that he did not want to buy it, that he has other things which he needed more necessary to purchase than a piano; that on one occasion Pierce offered to take it taxed and asked that it be left there on the same terms as Glaze had asked it; that finally, being unable to negotiate a sale of the piano to Pierce, Slagle told him that if he did not buy it, they would remove the piano as they needed it. He stated he replied to mentioned that he would not buy it, that Glaze said if he did not claim such furnish the that piano or another of equal value if Slagle took the piano. This appears, according to Slagle's testimony, to have been the first time that Pierce claimed any interest or owner or otherwise in the piano. Pierce denied this conversation. It was further testified by one Mr. Steele Dougherty, Glaze' father-in-law that upon an and Pierce that both prior to the sale and the date thereafter, Pierce came to Mr Glaze where the was ill in bed and while there was told on both occasions that the piano did not belong to Pierce Glaze and could not be included or given by him as it belonged to Slagle. This was denied by Pierce. Mr. Atkerson who was with Pierce in the latter occasion did not testify. Other also testified in rebuttal that subsequent to the delivery of the bill of sale and property in question, the insurance policy thereon was transferred by the insurance agent Harvey from Glaze to Pierce; that at that time, Pierce again stated that it would be a sore disaster if he, Pierce, bought the Slagle piano and gave it to Pierce and that Glaze proposed to substance that he had a sick wife and could not afford to do so. The insurance agent, C. A. Barker, corroborated that statement but did not recall whether it happened immediately before, or after October 1, 1941. It was further evidenced by Pierce that his only conversation he had with Mr. and Mrs. Slagle at the residence occurred when he had called to purchase certain clothes from his wife and requested to purchase certain clothes from his wife but he refused to sell and denied the conversation concerning the piano.

These conversations are alleged to have taken place at a table where the Siegles were eating in the center of one of the restaurant rooms but Mrs. Jex and another employee spoke of hearing the inquiry concerning the purchase of the dishes being made at the cash register and heard nothing said about the piano. The conversations with Pierce concerning the piano, however, were alleged by Mr. and Mrs. Siegle to have taken place on two occasions at one of the dining tables where they were eating and not at or near the counter. The attorney who drew the bill of sale after Claus had spoken to him recited in substance the conversation had between Claus and Pierce and that since the entire business of Claus was being sold except a few small items of personal property to be carried away, it was unnecessary to inventory the property and the bill of sale was drawn and signed by Claus and delivered to Pierce in the brief form hereinabove set forth. Siegle was not present during any of the above transactions and took no part therein and it is the theory of Appellant Pierce that oral testimony cannot be offered to alter or vary the terms of the written instrument and that the testimony of Claus concerning his status in denying that he was agent or that he did not own nor sell the piano was incompetent.

It will be noted from a careful reading of the bill of sale that it only purported to sell the interest of the business and property of Claus, the vendor, and neither specifically mentioned the piano nor any items of property included within its context or provisions, nor did it include or purport to include any property not then owned by Claus, the vendor therein. That Siegle, the undisputed owner of the piano prior to the consummation of the sale at no time sold the piano to Claus or to any other person seems to clearly appear from this record, even though it be conceded that the vendor was given a quotation at which he might purchase or sell the piano in question to others. There is a sharp conflict, as hereinabove indicated, between the testimony of the respective parties concerning material facts in issue. It must be kept in mind that Siegle was not a party to

These conversations are alleged to have taken place at a table where the singles were sitting in the center of one of the restaurant rooms but two. Jax and another employee spoke at hearing the inquiry concerning the purchase of the clubs being made at the cash register and heard nothing said about the piano. The conversations with Jimmie concerning the piano, however, were alleged by Mr. Jax and Mrs. Jackie to have taken place on two occasions at one of the dining tables where they were sitting and not at or near the register. The attorney who drew the bill of sale after Clara had spoken to him testified in substance the conversations had between Clara and Jimmie and that since the entire business of Clara was being sold except a few small items of personal property to be marked away, it was unnecessary to inventory the property and the bill of sale was drawn and signed by Clara and delivered to Jimmie in the belief that necessary was forth. Single was not present during any of the above conversations and took no part therein and it is the theory of Appellant Jimmie that oral testimony cannot be offered to alter or vary the terms of the written instrument and that the testimony of Jimmie concerning his status is denying that he was agent or that he did not own or sell the piano was incompetent.

It will be noted Jimmie's careful reading of the bill of sale that it only purported to sell the interest of the business and property of Clara, the vendor, not neither specifically mentioned the piano nor any items of property included within the contract in provisions, nor did it include or purport to include any property not then owned by Clara, the vendor herein. That finally, the undisputed owner of the piano prior to the consummation of the sale at no time said the piano to Jimmie or to any other person nor to directly appear from this record, even though it be conceded that the vendor has given a qualation as which he might purchase or sell the piano in addition to others. There is a sharp conflict, as aforementioned, between the testimony of the respective parties concerning material facts in issue. It must be kept in mind that Single was not a party to

the bill of sale in question, and under the facts as we view them and as the Trial Court viewed them, Pierce did not purchase the piano under the terms of the bill of sale and knew that he did not purchase the same, and that the piano belonged to and was owned by Siegle. It further so appears from the greater weight of the evidence as we view it, that Pierce never claimed ownership of the piano until long after the consummation of the sale. Then, after repeated refusals of Pierce to purchase the piano, Mr. Siegle sought to remove it from the premises and was obliged to sue out a writ of replevin to recover his property.

Numerous contentions and assignments of error by the Appellant have been duly considered by this Court upon which we have not commented herein and which we deem to be either inapplicable to the facts appearing in the record or to be without merit. If the so-called "trade fixtures" were not owned by the vendor who only undertook to sell his own business and fixtures under the language of the bill of sale, the piano had never been a part of the "trade fixtures" owned by the vendor and the citation of authorities by the Appellant concerning trade fixtures are not in point.

Considerable argument is indulged in by Appellant as to the credibility of the respective witnesses on disputed questions of fact and as to the weight of their evidence. The Trial Court heard the testimony, saw the witnesses testify and was in a better position than is this Court, upon review thereof, to judge of the weight and credibility of such testimony.

We hold that no prejudicial nor reversible error appears in the record under the assignments of error thereon; that the judgment of the Circuit Court was not contrary to the manifest weight of the evidence, but was, as we believe, in accord with the preponderance of the evidence. The judgment of the Circuit Court of Pike County is therefore affirmed.

JUDGMENT AFFIRMED.

the will of Sally in question, and under the facts as we view them and as the Trial Court viewed them, Plaintiff did not overcome the plaintiff under the terms of the bill of sale and have that in fact purchase the car, but that the money delivered to him was merely a loan. It further so appears from the greater weight of the evidence as we view it, that Plaintiff never obtained possession of the claim until after the consummation of the sale. Then, after receiving possession of claim or claims to authorize the plaintiff, defendant sought to have it that the property had been delivered to him and he had a right to recover his property.

Numerous decisions and assignments of error by the defendant have been duly considered by this Court upon which we have not commented herein and which we deem to be either immaterial in the light appearing in the record or to be without merit. In the so-called "brief filtered" were not found by the reader the only material to well his own evidence and filtered under the handicap of the evil of sale, the claim and never been a part of the "brief filtered" owned by the vendor and the creditor, or authorities or the questions concerning the brief filtered are not in point.

Considerable argument is indulged in by counsel as to the credibility of the respective witnesses on disputed questions of fact and as to the weight of their evidence. The trial court heard the testimony, saw the witnesses testify and was in a better position than is this Court, upon review thereof, to judge of the weight and credibility of such testimony.

We find that no prejudicial nor reversible error appears in the record under the assignments of error therein. But the judgment of the Circuit Court was not authority to the municipal weight of the evidence, but was, as we believe, in accord with the preponderance of the evidence. The judgment of the Circuit Court of this County is therefore affirmed.

AFFIRMED.

Abstract

General ~~number~~ No. 9401. Agenda ~~number~~ No. 9.

IN THE APPELLATE COURT 322 I.A. 177

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A. D. 1944

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|---|---|
| HENRY R. VELDE, DONALD F. VELDE, and EMMA S. VELDE, doing business as the VELDE LUMBER COMPANY, | APPEAL FROM THE CIRCUIT COURT OF TAZEWELL COUNTY. |
| Claimants-Appellees, | |
| -vs- | |
| C. C. REARDON and MARIE REARDON, as Executors of the Estate of William J. Reardon, Deceased, | ~~HONORABLE HENRY J. INGRUM~~, |
| Defendants-Appellants. | ~~Judge Presiding~~. |

HAYES, J.:

In 1930 C. Stark & Sons, a partnership in Pekin, Illinois contracted with James T. Cole of Chicago, Illinois, doing business as the Frigid Engineering & Equipment Company, for the installation of certain ice machinery. Cole entered into several contracts with Material men for materials which were used in the installation. Cole ran into financial difficulties and several of the Material men threatened to file mechanic's liens against Stark & Sons. On June 23, 1930 C. Stark & Sons executed several promissory notes payable to Frigid Engineering & Equipment Company which were secured by a chattel mortgage. On December 1, 1930 a meeting of the members of the partnership, certain of the creditors, and Cole, together with their respective attorneys, was held in the office of William J. Reardon,

Abstract

In 1950 C. Albert Koch, a graduate of Illinois, Illinois contracted with Frank T. Cole of Atlanta, Illinois, acting as the Public Engineering Department, for the installation of water, gas and sewer. Work started and several difficulties with engineering and materials were used in the installation. Due to the financial difficulties and several of the material men interested in the machinery there was a lien filed. On June 23, 1950 C. Koch obtained several judgments against Cole payable to Public Engineering Company which were secured by a certain mortgage. On December 1, 1950 a meeting of the members of the corporation, details of the organization, and Cole, together with their respective attorneys, was held in the office of William E. Hudson,

an attorney in Pekin. At that meeting a memorandum was prepared addressed to Reardon which was in part as follows: "Please pay from the mortgage notes of C. Stark & Son, as paid to you, the following amounts * * *." Then follows a list of creditors with the amount of their respective bills opposite their names. "We agree that the above amounts are correct and are to be paid with their share of the interest received on the above notes, and any balance to be paid to James T. Cole." The memorandum was signed by the Frigid Engineering & Equipment Co., by Cole, and by all the members of C. Stark & Sons. The notes previously executed by the members of the partnership were endorsed by Cole, and a number of them aggregating about $4,000.00 were turned over to Reardon. The payments made by Stark & Sons to Reardon on the notes more than covered the indebtedness listed in the memorandum, but the exact amount received by Reardon does not appear. Reardon died, and the Velde Lumber Co., one of the material men referred to above, filed its claim against his estate in the Tazewell County Court on May 7, 1942. This claim, after a hearing, was allowed on August 18, 1942 as a claim of the seventh class in the sum of $657.88. On appeal to the Circuit Court of Tazewell County the claim was allowed as of the fifth class in the sum of $1,074.79. The executors of Reardon's estate have appealed to this court.

Appellants first contend that the evidence introduced by appellee itself shows that the claim was paid by Reardon before his death, from funds received from Stark & Sons. In support of this they refer to a letter written by Reardon to Cole dated November 23, 1931 in which he stated: "* * * in another month I will have

an attorney in Paris. At that meeting a memorandum was prepared entitled "Condition which was to have to collect "Loans for the mortgage notes of C. Jones & Son, as paid to you, the following amounts + & ." Jones initiated a list of creditors with the amount of their respective bills opposite their names. "We agree that the above amounts are correct and are to be paid with more interest of the interest received on the above notes, and are willing to be paid to Jones C. Jones." The memorandum was signed by the little individuals represented, by Dale, and by all the members of C. Jones & Sons. The notes previously received by the members of the partnership were endorsed by Dale, and a number of them totaling about $1,000.00 were turned over to Jerdon. The payments made by Jones & Sons to Jerdon on the terms were then returned the indebtedness listed in the memorandum, and the usual course involved by Jerdon's case in Jones. Jerdon died, and the Dale Lumber Co., one of the creditors was returned in above, filed its claim against his estate in the Tuscarel County court on May 7, 1900. Jones was, after a hearing was claimed in August 19, 1900 as a claim of the Dale Lumber Co. for the sum of $217.00. He appeal to the Circuit Court a jury trial claiming the claim was barred as of the fifth claim in the sum of $1,000.00. The administrator of Jerdon's will he have appealed to this court.

Questions first arrived that the evidence introduced by appellee tended which the claim was paid by Jerdon before his death, from Jones received from Jones & Sons. It appeared at this hearing that in a letter written by Jerdon to Dale Lumber Company &c. (it is stated he stated: "If I am another month I will have

the Pekin creditors cleaned up," and also to the fact that the record here does not indicate that any of Cole's other creditors filed a claim against Reardon's estate. The phrase from the letter quoted above proves nothing. It might mean that none of the creditors had been paid on the date of the letter but all would be paid within a month; that part of the creditors had already been paid in full, the remaining ones to be paid within a month; or that all of the creditors had received partial payments on their accounts, the balance on each account to be paid within a month. It certainly is not proof that appellee had received anything on its account on the date of its letter or that it was paid in full within a month from that time. Nor is the fact that this record contains no proof that other creditors of Cole filed claims against Reardon's estate of any significance. The burden of introducing such evidence, assuming it were competent, would be upon appellants, yet they did not see fit to introduce any evidence at all at the hearing in the Circuit Court. Appellee sustained its burden of proof by establishing that sufficient funds were received by Reardon on the Stark & Sons notes to pay in full the claims of all of Cole's creditors. It then became the duty of appellants to establish payment of appellee's account, if such was their defense. This they failed to do. Andrews v. Votaw, 240 Ill. App. 311.

It is next contended that appellee's claim is barred by laches or the Statute of Limitations. Appellee argues that Reardon held the money which he received pursuant to the agreement executed in December 1930 as trustee, and that the doctrine of laches and the Statute

the Public creditors elected to," and also to the fact that the record here does not indicate that any of some other creditors filed a claim against Hamilton's estate. The phrase from the latter quoted above proves nothing. It might mean that some of the creditors had been paid on the date of the judgment but all would be paid within a month; that part of the judgment had already been paid in full, the remaining none to be paid within a month; or that all of the creditors had received partial payments on their accounts, the balance on each account to be paid within a month. It particularly is not proof that appellee had received anything on its account on the date of the judgment or that it was paid in full within a month from that time. For in the fact that this record contains no proof that other creditors of Dana filed claims against Hamilton's estate or any significance. The burden of introducing such evidence, assuming it was competent, would be upon appellants, yet they did not see fit to introduce any evidence at all in the matter in the District Court. Appellee contended that notice of proof of validity of that sufficient fund was required to justify an order on the part of the court to pay in full the claims of all of Dana's creditors. If then, because the duty of appellants to establish payment of appellee's account, it did not do it before. This they failed to do. Gutman v. Peters, 249 Ill. App. 311.

It is most convenient that appellee's claim is barred by laches or the statute of limitations. Appellee argues that Section 2a2 the Court erred in receiving payments on the account commenced in December 1929 in arrears, and that the doctrine of laches and the statute

of Limitations do not operate as between trustee and cestui que trust. That this latter proposition states the law correctly, there can be no question. A trust relationship has been expressly established and is still in existence, Maher v. Aldrich, 205 Ill. 242; Ellis v. Ward, 137 Ill. 509, and we are further of the opinion that such a relationship existed here. In Kilgore v. The State Bank of Colusa, 372 Ill. 578, the Supreme Court states: "To set up a valid express trust of personal property there must be a declaration by a person competent to create it, a trustee, designated beneficiaries, a certain and ascertained object, a definite fund or subject matter, and its delivery or assignment to the trustee." The agreement between Cole, Stark & Sons, and Reardon in December of 1930 fulfills all of these requirements. Cole and the members of Stark & Sons were competent to create a trust and Reardon assumed duties properly undertaken by a trustee. He was not Cole's agent during this transaction as appellants claim. Cole was represented by another attorney, and Reardon, in fact, if he represented anyone, represented appellee who was a creditor and therefore a beneficiary of any agreement that might be made. Nor would this latter employment bar him from acting as trustee. The significant thing is that Reardon was chosen by all parties concerned to collect the money from Stark & Sons for Cole and to pay it to Cole's creditors. By agreeing to do so, Reardon entered into a fiduciary relationship with Cole, Stark & Sons and the creditors. The memorandum executed on December 1, 1930 sets up the designated beneficiaries of the trust and defines the object of the trust to be the liquidation of the accounts therein set up. Moreover, the requirements

of limitations do not operate to remove crimes [illegible]
vested the court. Thus, only latter jurisdiction [illegible]
the law correctly, there can be no question. [illegible]
relationship has been correctly conceptualized and is still
in existence, Baker v. [illegible], [illegible] III. [illegible], [illegible] v.
Hard, 137 Ill. 507, and we are unaware of the opinion that
such a relationship exists here. In Pillsbury v. The People
ex rel. of Colson, 172 Ill. 272, the Supreme Court stated:
"It can not be a valid exercise of personal property that
must be a declaration by a person competent to create it,
a trustee, designated beneficiaries, a certain and ascer-
tained object, a definite fund or property in fact, and the
delivery or assignment to the trustee." The agreement
between Dale, Grace & Cone, and Bardon is dated 1
1930 [illegible] all of these requirements. [illegible] and the
[illegible] of Grace & Cone were competent to create a trust
and therefore assumed duties necessarily attributed to a trustee.
He was not Dale's legal heir, nor the beneficiary of applicants
claim. Dale was represented by another attorney, and therefore,
in fact, if he [illegible] [illegible], [illegible] opposition
was a creditor and therefore [illegible] of any agreement
that might be made. Nor would this latter employment bar
his from acting as trustee. The substantial thing is that
Bardon was chosen by all parties concerned to collect the
money from Grace & Cone for Dale and to pay it to Dale's
creditors. By agreeing to it so, Bardon entered into a
fiduciary relationship with Dale, Grace & Cone and the
creditors. The instrument executed on December 1, 1930
and by the testimony constitutes on the trust had
defined the object of the trust to be the liquidation
of the community property and [illegible]. Moreover, the requirements

noted above of a definite fund and its assignment to the trustee are satisfied by the delivery of the notes of Stark & Son endorsed by Cole to Reardon. It is important to note also that Reardon apparently believed that a trust relationship existed here and that he was a trustee, inasmuch as in a letter dated April 30, 1931 and introduced in evidence in this cause Reardon stated, "I am the Trustee for the collection of C. Stark & Co. chattel mortgage."

The fact that no formal trust agreement was ever drawn up by the interested parties is of no importance. As was said in Dawes v. Dawes, 116 Ill. App. 36, "No particular form of words is necessary to create a trust * * *. The word 'trust' need not be used. Any expressions which show unequivocally the intention to create a trust will have that effect." The memorandum referred to above, coupled with the action of the various interested parties thereafter, is ample evidence that a trust was created on December 1, 1930 and interpreted as such by all concerned.

Having decided that an express trust was established here and that no proof of payment has been shown, we therefore hold that the Circuit Court of Tazewell County properly allowed appellee's claim as a claim of the ~~seventh~~ fifth class. Under the classification, money held by a trustee under an express trust which he has not accounted for at the time of his death may be recovered from his estate. Ill. Rev. Stat. 1943, Ch. 3, Sec. 354; Levy v. Kuss, 219 Ill. App. 194.

The judgment of the Circuit Court of Tazewell County is therefore affirmed.

JUDGMENT AFFIRMED.

total score of a delicate line and its movements in the
tracks are regulated by the delivery of the point of
Jerry's pen measured by rule to Berlin. It is impossible
to make also that Berlin apparently relinquished into a great
relationship related here and that as one a trustee, inter-
mediate as he a letter dated April 20, 1921 and interpreted it
reference in all every another instance, "I am the trustee
for the collection of J. Jerry & Co. Limited Company."

The fact that he Jerry never presented any over
drawn up by the interpreter prelude to an injunction.
is way made in Dunne v. Jones, 119 Ill. App. 16. The
particular form of words is immaterial to create a prelu-
". The word 'trust' need not be used. Any expression
which more unmistakably the intention to create a trust
will have that effect." The instrument referred to here,
coupled with the evidence of the relations between parties
thereafter, is quite sufficient that a trust was created on
December 1, 1920 and interpreted as such by all concerned.

During lapsed time in question here, the estab-
lished here and that is proof of property was Jerry Jones,
of therefore held that the Jerry Jones of Jerry Jones
properly allowed plaintiff's claim as a claim or the common
stock. Under the circumstances, Jerry had a trustee
under no obligation that which he was not concerned for is
the time of his death may be recovered from his estate.
Ill. App. Ter. 2d, 3. 3, Ter. 2d; Hart v. Hart, 212
Ill. App. 191.

The judgment of the circuit court of Jerry Jones
is therefore affirmed.

JUDGMENT AFFIRMED.

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GEN. NO. 9928 AGENDA NO. 21

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A.D. 1943.

| | |
|---|---|
| FRANKLIN LIFE INSURANCE COMPANY, AN ILLINOIS CORP., APPELLEE, vs. ROBERT B. EDWARDS, ET AL., ( JOHN R. SNIVELY, APPELLANT) | APPEAL FROM THE CIRCUIT COURT OF STEPHENSON COUNTY. |

HUFFMAN, J.

Appellee was the legal holder of note and mortgage on certain premises, executed by Robert B. Edwards and Winifred, his wife. Appellant, John R. Snively, became owner of the property. The loan was payable in monthly installments. The installment which fell due on March 1, 1941, was not paid. No installments were paid after said date. Delinquent taxes against the property were paid by appellee. The original loan was $5800, and made under date of September 28, 1939. On March 1, 1941, a balance of $5537.91 remained

No. 80, Orig.

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IN THE SUPREME COURT OF ILLINOIS

FALL TERM

STARVED ROCK, A.D. 1940.

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| | |
|---|---|
| PEOPLE'S LIFE INSURANCE COMPANY, an Illinois corp., Appellee, vs. MOORE E. ALLEN, et al., JOHN J. ELLIOTT, Appellant) | Appeal from the Appellate Court of Illinois, 2nd District. |

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MOORE, J.

Appellee was the legal holder of four life insurance policies on Joseph Moore, deceased, payable to Moore E. Allen and Elliott, its wife. Appellant, John J. Elliott, became owner of the property. The lives are insured in monthly installments. The insured died July 1, 1939, due on March 1, 1940, was not paid. In installments were paid after said date. Contended that appellee was properly sent a bill of arrears. The insured died on May 2, 1940. Not made under date of December 1, 1939. On March 1, 1941, a balance of $200.97 remained

due on the principal. Pursuant to the contract, plaintiff elected to declare the entire debt due and instituted foreclosure proceedings in November, 1941.

The mortgage contract assigned all rents to the mortgagee and provided that in the event the mortgagee should elect to declare the entire debt due, that the mortgagee should have the right upon the filing of a suit to foreclose, and without notice to the mortgagors or those claiming under them, and without regard to the solvency of those liable for the debt or the value of the premises, to the immediate appointment of a receiver with power to collect the rents from the premises during the pendency of such suit, and in case of a deficiency, then during the period of redemption.

Upon petition of appellee, the court appointed a receiver to collect the rents from the premises involved. Appellant made motion to vacate the order appointing receiver, which motion was denied. Answers were filed by all defendants except the tenant, Finn. Appellant filed a counterclaim which was withdrawn.

On a hearing, the court rendered decree for appellee, making the usual findings incident to a foreclosure decree. The total sum of $6322.55 was found due upon the mortgage indebtedness. The defendants, Robert B. Edwards and his wife, Winifred, were found to be personally liable for such indebtedness. The court found that the receiver had on hands the sum of $503.40, which he had collected

due on the principal. Pursuant to the contract, plaintiff elected to declare the entire debt due and instituted foreclosure proceedings in November, 1921.

The mortgage contract assigned all rents to the mortgagee and provided that in the event the mortgagee should elect to declare the entire debt due, that the mortgagee should have the right upon the filing of a suit to foreclose, and without notice to the mortgagors or those claiming under them, and without regard to the solvency of those liable for the debt or the value of the premises, to the immediate appointment of a receiver with power to collect the rents from the premises during the pendency of such suit, and in case of deficiency, then during the period of redemption.

Upon petition of appellee, the court appointed a receiver to collect the rents from the premises involved. Appellant made motion to vacate the order appointing receiver, which motion was denied. Answers were filed by all defendants except the tenants. Appellant filed a counterclaim which was withdrawn.

On a hearing, the court rendered decree for appellee, adjudging the usual findings incident to a foreclosure decree. The total sum of $6329.65 was found due upon the mortgage indebtedness. The defendants, Robert S. Edwards and his wife, Winifred, were found to be personally liable for such indebtedness. The court found that the receiver had on hands the sum of $803.40, which he had collected

as rents from the property. This sum was ordered applied upon the mortgage debt which reduced the same to $5819.15. Decree was entered finding the balance of $5819.15 due. Said decree was rendered February 11, 1943. Appellant Snively filed his motion to vacate the decree, urging that a previous decree of foreclosure had been entered September 9, 1942. We fail to find any such decree in the abstract or record, and we are referred to none. The only decree we find is that of February 11, 1943, appearing on page 15 of the abstract.

The premises were sold pursuant to foreclosure decree, and report of sale filed. It disclosed that the property sold for $5400, and after payment of costs and fees incident to the suit, a deficit of $599.60 remained. Appellant Snively filed objections to the report of sale. He objected to the sale being made by a special master, urging he was without authority to sell the premises. It appears that the trial court under date of February 19, 1943, entered its order finding that the regular master in chancery of said court, who by the decree of February 11, 1943, was directed to carry out same, was absent from the State of Illinois and unable to execute such decree, and that his absence would continue for some two months, and that it appeared a special master was necessary in order to carry out the decree. Whereupon the court appointed Robert C. Hunter as special master. It was the special master who made the sale and to whose report of sale, appellant objects. The objections to the report

as rents from the property. This sum was ordered applied upon the mortgage debt which reduced the sums to $[illegible]. Leave was entered finding the balance of $[illegible] due. Said decree was rendered February 11, 1940. Appellant timely filed his motion to vacate the decree, urging that a previous decree of foreclosure had been entered September 9, 1937. We fail to find any such decree in the abstract or record, and we are relegated to guess. The only decree we find is that of February 11, 1938, appearing on page 15 of the abstract.

The premises were sold pursuant to foreclosure decree, and report of sale filed. It discloses that the property sold for $[illegible], and after payment of costs and fees incident to the sale, a deficit of $[illegible] remained. Appellant timely filed objections to the report of sale. He objected to the sale being made by a special master, urging he was without authority to sell the premises. It appears that the trial court under date of February 16, 1943, entered its order finding that the regular master in chancery of said court, who by the decree of February 11, 1943, was directed to carry out same, was absent from the state of Illinois and unable to execute said decree, and that his absence would continue for some two months, and that it appeared a special master was necessary in order to carry out the decree. Thereupon the court appointed Robert O. Hunter as special master. It was the special master who made the sale and to those reports of sale, appellant objects. The objections to the report

of sale were overruled and the same approved by the court. Sales under foreclosure decrees are judicial in character and subject to the control and approval of the court. The master is a mere instrumentality of the court. When it appears that for any reason the regular master is unable to act, the court has power to appoint a special master or commissioner in his stead.

Appellant objects to the action of the court in denying his motion to vacate order appointing receiver; the denial of his objections to the special master's report; and denial of his motion to vacate the decree of foreclosure as rendered February 11, 1943. He further filed a motion in the trial court for a rehearing, which was denied. There is no assignment of errors, yet the above points represent those involved. Appellant made general appearance in the case. No appeal was taken except this present one.

Certain alleged irregularities are urged, none of which appear to have in any way tended to prejudice appellant's rights. For instance, he urges that the receiver appointed to collect the rents did not file his bond until after he had begun to act as such receiver. However, he accounted for the money he received and therefore the rights of no one were injured. Nothing appears from this objection which would cause this court to believe that any different result would be had or would have been had, in the event the receiver had been more diligent in

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filing his bond. Appellant also objects to the collection of the rents by such receiver. The mortgage conveyed and pledged the rents, profits and issues as additional security for the payment of the indebtedness, and further provided that upon the filing of suit to foreclose, a receiver to collect the same might be immediately appointed, without notice, and without regard to the solvency of the parties liable for the debt or the value of the premises. Such provisions are matters of contract between the parties and are recognized as such. Greenebaum Sons Bank & Trust Co. vs. Kingsbury, 248 Ill. App. 321; Steinberg vs. Kloster Steel Corp., 266 Ill. App. 60.

We find no reversible error in the record. The decree is therefore affirmed.

Decree affirmed.

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We find no reversible error in the record. The decree is therefore affirmed.

Decree affirmed.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

322 I.A. 178

February Term, A. D. 1944

Term No. 4301 | Agenda No. 9

EVELYN BONE,

Plaintiff-Appellant

vs.

PUBLIX GREAT STATES THEATRES, INC., a Corporation,

Defendant-Appellee.

Appeal from the Circuit Court of St. Clair County.

1203
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CULBERTSON, P. J.

This is an appeal from the Circuit Court of St. Clair County by the appellant, EVELYN BONE (hereinafter referred to as plaintiff), from a judgment non obstante veredicto in favor of Appellee, PUBLIX GREAT STATES THEATRES, INC., a Corporation (hereinafter referred to as defendant), and from an alternative order entered by the Trial Court pursuant to the provisions of Supreme Court Rule 22, granting defendant a new trial. The verdict of the jury was in favor of the plaintiff and her damages were fixed at $2,000.00.

The amended complaint alleged that on July 24, 1941, defendant operated a moving picture theater in the City of East St. Louis, known as the "Majestic Theatre" and that it maintained in said theater a stairway extending from the main floor to the mezzanine floor; that the steps of that stairway were covered with a carpet; and that the defendant permitted said steps to be covered with an uneven, loose and insecurely fastened carpet which caused a dangerous and hazardous condition to persons using the stairway; and that such fact was well known to the defendant, or by the

exercise of reasonable care should have been known to it. That while plaintiff was a patron in said theater, and was descending said stairway in the exercise of ordinary care, she was caused to and did fall down said stairway, and to the floor beneath, and thereby severely injured herself. The answer of the defendant admitted the ownership and operation of the theater, and the duty of the defendant to maintain and keep its steps and stairway in a reasonably safe condition, but denied all other allegations of the amended complaint.

The evidence produced on the trial of this cause establishes that the defendant owned and operated a public moving picture theater on the east side of Collinsville avenue in East St. Louis. It appears that there was a booth situated near the property line on Collinsville avenue, where patrons purchased their tickets. After purchasing a ticket the patron walked in an easterly direction, through a corridor, for a distance of approximately 25 or 30 feet, to the lobby or foyer. The seats on the main floor were immediately east from the end of the corridor. Upon entering the foyer, there was a stairway that extended upwards in a general southerly direction along the west wall of the theater. This stairway led to the mezzanine and balcony, the defendant's office, and the ladies and mens restrooms. The steps were approximately 8 feet wide and were covered with a carpet. The carpet was made of three separate strips 27 inches wide. There were 15 steps from the foyer to the first landing, and another flight of 6 steps that extended from that landing to the other parts of the theater. From the evidence it appears that at about one p.m. on July 24, 1941, the plaintiff, who was then 40 years of age, accompanied by a neighbor girl named Patsy Mason, aged 13 years, paid their admission price and entered defendant's theater. They proceeded east through the corridor, and entered the foyer or lobby on the main floor. It appears from the evidence that

Patsy Mason desired to go to the ladies rest room and plaintiff accompanied her. They ascended the stairway heretofore described, using the east portion thereof, along the hand rail. They remained in the ladies rest room a short time and then began to descend the stairway to take seats on the main floor and observe the performance. As they came down the stairway the evidence discloses, plaintiff was walking down the center of the stairway and Patsy Mason was walking to her left, and was a step or two in front of her. Plaintiff contends that as she attempted to descend the stairway the loose rug on the sixth step from the top of the stairway caught the heel of her left shoe and her weight and her forward motion caused the heel to pull off of her shoe and she lost her balance and fell to the floor beneath the stairway. She testified that as she started to take a step, that she couldn't pick her left foot up; that it hung in the rug and she felt herself giving with the rug, and tried to catch herself, but couldn't, and fell. She testified that when her foot stepped on the rug it felt "just like the rug was slipping."

The witness, Patsy Mason, testified that after hearing and seeing plaintiff fall, she turned around to see the cause thereof, and that when she turned around she observed the heel of plaintiff's left shoe lodged in the rug on the step from which plaintiff had fallen, and she went to retrieve the heel. The testimony of this witness is that she heard a thud and Mrs. Bone went down the steps. This witness testified that she saw the step Mrs. Bone fell from and the heel of the shoe on that step, and that she picked the heel up. This witness testified that the rug was pulled from the back of the steps and it was all wrinkled up "sort of" and that the heel of Mrs. Bone's shoe was sticking up between two big wrinkles, and that these wrinkles were about three-fourths of an inch high.

Mrs. Velma Fitts, a witness called on behalf of the

plaintiff, testified that about three days prior to the date plaintiff was injured, she was descending this same stairway, and as she walked in the middle of the sixth or seventh step from the top her foot slipped on a loose carpet but that she was able to and did catch herself and thus prevented a fall down the stairway. This evidence was admitted to show defendant's knowledge of the condition of the rug that covered the stairway. The injuries sustained by plaintiff appear to be serious and the size of the verdict does not appear to have been challenged as being excessive.

Defendant's manager, and three employees of defendant corporation, testified that they examined the stairway within fifteen minutes to one hour after the accident happened. Robert Klie an usher, testified that he examined the carpet and could not find any place where the carpet was loose. James McCullough, defendant's manager, testified that he examined the stairway and found no step upon which the carpet was wrinkled or loose. Another of the defendant's ushers, Stewart Gavett, testified that he was the first to examine the stairway after plaintiff's fall and that he went up and down the stairway, kicking at the rug, but he found no wrinkled or loose carpet. Defendant's maintenance man, Frank Heiwieck, testified that he went up and down the stairway, kicking at the rug, but observed no place where the carpet was loose or wrinkled. From the deposition of Frank R. Schura, a former East St. Louis policeman, it appears that he was seated in the theater when plaintiff fell and that his attention was called to the occurrence by Mr. Gavett, who asked him to look at the steps. This witness testified that when he got to the stairway, Mrs. Bone was being taken to the ambulance, and that he examined the east and west sides of the stairway and did not examine the middle of the stairway, and that his examination revealed no wrinkles or loose carpet on the stairway. This, we believe, fairly summarizes the evidence produced on the trial of this case

for both the plaintiff and defendant.

On this appeal the correctness of the Court's action in allowing the motion for a judgment notwithstanding the verdict is challenged, as is the indicated action of the Court that a motion for a new trial would be allowed for the reason that the Trial Court found that the verdict was against the manifest weight of the evidence.

The sole question raised by a motion for a judgment non obstante veredicto is whether the motion for a directed verdict should have been allowed (FREEMAN vs. THE LEADER MERCANTILE CO., 313 Ill. App. 652; OLIVER vs. KELLY, 300 Ill. App. 487; FARMER vs. ALTON BLDG. & LOAN ASSN., 294 Ill. App. 206). In passing upon a motion to direct a verdict the Court must consider the evidence produced by the plaintiff, together with all reasonable inferences therefrom strongly in favor of the plaintiff, and must reject all contradictory evidence and all explanatory circumstances (BLUMB vs. GETZ, 366 Ill. 273; SCHIERMEIER vs. HOEFFKEN, 309 Ill. App. 250). Under the evidence produced in this case, and applying thereto the well-established Rules set forth in the authorities hereinbefore enumerated, we must conclude that the Trial Court committed error in allowing the motion for a judgment non obstante veredicto, and his action in that regard will be reversed.

We believe, also, the evidence produced on the trial of this cause by plaintiff, while highly conflicting with that produced by the defendant, was of such quantum that a verdict returned thereon by the jury cannot be said to be against the manifest weight of the evidence. We find no charge of error on the part of the Trial Court in his rulings on the evidence or in the giving or refusing of instructions. An issue of fact was determined by the jury in favor of the plaintiff and we are not disposed to disturb that verdict. We believe the Motion for a

Judgment notwithstanding the Verdict should have been denied, and also that the Motion for a New Trial should have been denied. This case is therefore reversed and remanded to the Circuit Court of St. Clair County, with directions to overrule both of said Motions and to enter judgment on the verdict.

Reversed and remanded, with directions.

Abstract

FILED
MAR 16 1944
David G. Mallott
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT STATE OF ILLINOIS

42893

ANTOINETTE JANOVSKY,
Appellee,

v.

BYSTRA VODA BUILDING AND LOAN ASSOCIATION, a Corporation,
Appellant.

322 I.A. 178

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

86
369

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her through the negligence of defendant in maintaining an apartment building in which plaintiff was one of the tenants. Defendant denied that it owned or operated the building at the time plaintiff was injured. There was a jury trial, a verdict and judgment in plaintiff's favor for $2,500 and defendant appeals.

The record discloses that Mr. and Mrs. Vrdsky, the owners of the apartment building, mortgaged the premises to the defendant Building and Loan Association and being in default, the association on March 30, 1935, filed its bill to foreclose the lien of the mortgage and June 4, 1935, the court appointed John DeGerald receiver who qualified and entered upon the discharge of his duties. There was a decree of foreclosure, the property was sold to the mortgagee, the Building and Loan Association, and a deficiency decree entered. August 27, 1937, DeGerald, the receiver filed his final account which was approved September 10, 1937, and it was ordered and adjudged "that the Receiver's Final Account and Report be, and the same is hereby approved. That the Receiver be allowed the sum of $90.00 for his fees as Receiver in the above entitled cause. That the Receiver be discharged from his further duties and his surety be released and cancelled, and that the balance on hand after paying

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Appellant,

v.

Appellee.

Appellee.

[illegible]

[illegible]

[illegible]

to the Receiver his fees, be paid over to the BYSTRA VODA BUILDING AND LOAN ASSOCIATION, an Illinois Corporation, the plaintiff herein, to apply on the deficiency decree heretofore entered herein."

The evidence shows that there were apartments and a store in the building, one of which was occupied by plaintiff and that on June 6, 1937, while she was in the act of washing one of the windows in her apartment the ropes of the window broke which caused her to fall in the alley at the side of the building, as a result of which she was injured.

Plaintiff's evidence was to the effect that she paid her rent to the defendant Building and Loan Association and had never seen or heard of the receiver Reginald Peter Guner, who was the secretary of the defendant association, called by plaintiff as an adverse witness under the statute, testified that he had been connected with the association since 1920; that his duties from 1935 to 1937 were to collect on mortgages and keep the records of them in the books of the association. That defendant had a mortgage on the premises in question which was formerly owned by Mr. and Mrs. Vrdsky; that they fell behind in their payments and the foreclosure suit was brought March 30, 1935; that the association did not collect any rents from the property until the receiver was discharged in September, 1937; that the records of the association did not show that the association collected any rents before the receiver was appointed; that he, the witness, at the receiver's request, collected some rents for the receiver who was at that time working for a real estate firm. That the receiver was an old friend and he did the work for the receiver as a favor for which he received no remuneration. The witness further testified that he had been to the building with the receiver a number of times before the accident and introduced the receiver to the tenants.

Plaintiff introduced in evidence five receipts showing the payment of her rent. The receipts are as follows: one dated

to the bookkeeper his form, he paid over to the School that attended the final examination, in different departments, the liability which to apply on the building owned respective school boards.*

The evidence showed that there were quarrels and a stoppage in the building, for it which was occupied by plaintiff and then on June 6, 1907, while the work in the act of erecting one of the windows in her property the roofs of the house upon which caused the to fall in the alley on the side of the building, in a result of which she was injured.

Plaintiff's evidence was to the effect that she paid her rent to the defendant [illegible] and had lessees and had [illegible] been the owner of the property [illegible] ownership of the contract erection, which [illegible] advertise [illegible] contract, [illegible] that he had been [illegible] with the erection since then; that the defendant [illegible] to 1907 [illegible] to collect on mortgages and keep the proceeds of them in the bank of the [illegible]. That [illegible] was a mortgage on the property in question which was foreclosed [illegible] the [illegible] time left [illegible] in question which [illegible] and the [illegible] [illegible] the property [illegible]; that the [illegible] did not [illegible] any rents from the property until the receiver was [illegible] September, 1907; that the owners of the [illegible] that the [illegible] [illegible] and [illegible] [illegible] [illegible]; that the [illegible], if the receiver's [illegible], [illegible] some rents for the receiver and not if [illegible] [illegible] [illegible] estate fund. That the receiver had in old [illegible] and [illegible] work for the receiver as a [illegible] for [illegible] [illegible] [illegible] [illegible] building with the receiver a number of times [illegible] [illegible] and introduced the receiver to the tenants.

Plaintiff introduced in evidence the [illegible] [illegible] [illegible] [illegible]

1-31-1938, which recites, "Received from Mrs. Anton Janovsky Twelve Dollars Rent," signed "Anna Super." Another receipt was dated 3-31-1938, for $12 for rent "from 2-1 to 3-1" signed "P. Super." The next receipt is dated, "9-29-1937" and acknowledges receipt from plaintiff of $36 for rent "From June 1st to 9-1-37" signed by Peter Super, Secretary. And the other receipt is dated, "3-7-1938, for rent from January 1 to February 1, 1938" signed by Peter Super. Plaintiff also introduced in evidence a business card which she testified she received from Peter Super, Secretary of the Building and Loan Association.

There is other evidence in the record as to the nature of plaintiff's injuries and the expenses incurred by her but in the view we take of the case we think it unnecessary to refer to it here.

Counsel agree, as we understand their briefs, that if the building was in the possession of the receiver at the time plaintiff was injured she cannot recover against the defendant association. But counsel for plaintiff says "Plaintiff's contention throughout the trial and now is that although a receiver was appointed to manage the building in question, the defendant building and loan association in fact had the actual possession, management, control and operation of the building during all or most of the period it was ostensibly in Receivership." On the other side, counsel for defendant says that the evidence shows beyond dispute that the receiver was in possession of the premises at the time plaintiff was injured and that the court should have directed a verdict at the close of the evidence as requested by defendant. We think this contention must be sustained. The undisputed evidence is that the association filed its bill to foreclose the lien of the trust deed on the premises March 30, 1935, and on June 4, 1935, the court appointed DeGerald receiver of the property and he continued to act until he was discharged by order of court on August 27, 1937, which was more than two months after the accident occurred. The order appointing the receiver is in the record. It recites the coming on of the

1-31-1929, which reads, "Received from Mrs. Anton Janovsky twenty Dollars rent," signed "Mrs. Sugar." Another receipt was dated 2-31-1929, for its for rent "from -1 to 3-1" signed "Mrs. Sugar." The next receipt is dated, "3-29-1929" and acknowledges receipt from plaintiff of $25 for rent "from this 1st to 5-1-29" signed by peter sugar, secretary. And the other receipt is dated, "5-7-1929, for rent from January 1 to February 1, 1929" signed by peter sugar. Plaintiff also introduced in evidence a receipt and which she testified she received from peter sugar, secretary of the building and loan association.

There is other evidence in the record as to the nature of plaintiff's injuries and the expenses incurred, but we feel in the view we take of the case we think it unnecessary to refer to it here.

Counsel agree, as we understand their briefs, that if the building was in the possession of the receiver at the time plaintiff was injured she cannot recover against the defendant association, but counsel for plaintiff says "plaintiff's contention throughout the trial and now is that although a receiver was appointed to manage the building in question, the defendant building and loan association in fact had the actual possession, management, control and operation of the building during all or most of the period it was actually in receivership." On the other side, counsel for defendant says that the evidence goes beyond dispute that the receiver was in possession of the premises at the time plaintiff was injured and that the court should have directed a verdict as the close of the evidence as requested by defendant. We think this contention must be sustained. The undisputed evidence is that the association filed its bill to foreclose the lien of the trust deed on the premises March 26, 1928, and on June 4, 1928, the court appointed Leonard receiver of the property and he continued to act until he was discharged by order of court on August 2, 1929, which was more than two months after the accident occurred. The order appointing the receiver is in the record. It recites the coming on of the

association's motion for the appointment of a receiver of the premises and it was ordered that John DeGerald be appointed receiver of the apartment building "and he is hereby directed to take possession of such property, manage and operate the same and collect the rents, issues and profits therefrom, both heretofore and hereafter accruing, to make all necessary repairs and alterations thereon, secure tenants therefor and lease the same for periods not to exceed in each instance, the period of this receivership, to secure said premises from loss by fire and other casualty, to pay taxes and special assessments, *** and to have and perform the other casual powers of receivers in such case."

The master's report of sale and distribution pursuant to decree entered January 11, 1936, shows that he sold the property February 5, 1936, to defendant who was the plaintiff in the foreclosure suit. The record further shows that the redeiver filed his final report of the rents collected and the disbursements made, which showed that the rent for June and July, 1937, had not been paid; and the record discloses that the rent for these two months was paid September 29, 1937, by plaintiff, as shown by the receipt which we have above quoted, after the discharge of the receiver, to the secretary of the Building and Loan Association. This was after the sale of the premises to the defendant association and this rent reduced the amount of the deficiency decree. It was not necessary for the receiver to collect the rents personally - he could have some one to do it for him. This the evidence shows he did. There is no contention that the records of the Circuit court in the foreclosure suit did not speak the truth. In these circumstances, the judgment of the Circuit court of Cook county cannot stand and it is reversed.

JUDGMENT REVERSED.

Niemeyer, J., and Matchett, J., concur.

association's motion for the appointment of a receiver of the premises and it was ordered that upon defendant's insolvent receiver of the apartment building "and he is hereby directed to take possession of such property, manage and operate the same and collect the rents, issues and profits thereof, with authority and power after accounting, to make all necessary repairs and alterations thereon, secure tenants therefor and lease the same for periods not to exceed in each instance, the period of this receivership, to secure said premises from loss by fire and other casualty, to pay taxes and special assessments, etc. and to have and possess the other general powers of receivers in such cases."

The master's report of sale and distribution pursuant to decree entered January 11, 1938, shows that he sold the property January 8, 1938, to defendant who was the plaintiff in the foreclosure suit. The report further shows that the receiver filed his final report of the rents collected and the disbursements made, which showed that the rent for June and July, 1937, had not been paid; and the master finds that the rent for these two months was paid September 10, 1937, to plaintiff, as shown by the receipt which is here more quoted, after the discovery of the receiver, to the secretary of the building and loan association. This was after the sale of the premises to the defendant association and this act reduced the amount of the deficiency decree. It was the necessary for the receiver to collect the rents personally - he could give some one ~~xx~~ to do it for him. With the evidence above he did. There is no contention that the records of the circuit court in the foreclosure suit did not speak the truth. In these circumstances, the judgment of the circuit court of Cook county should and it is reversed.

Judgment reversed.

Sherwin, J., and Matchett, J., concur.

42954

J. KENT GREENE,
Appellant,

v.

JOHN TOMAN, UNITED STATES FIDELITY AND GUARANTY COMPANY,
Appellees.

322 I.A. 179

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

87

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago against Alexander and Kathleen E. Moseley, John Toman, former sheriff of Cook county, United States Fidelity and Guaranty Company and Thomas J. O'Brien, who was sheriff at the time the suit was brought, to recover $600. Toman and the Surety Company were the only defendants served. They filed their motion to strike plaintiff's statement of claim, the motion was sustained, the suit dismissed and plaintiff appealed. We reversed the judgment holding that the statement of claim stated a cause of action and remanded the cause, Greene v. Toman, et al, #42399. Toman and the Surety Company filed their answer. The case was heard before the court without a jury, there was a finding and judgment in defendants' favor and plaintiff appeals.

In our former opinion we stated the facts somewhat in detail and there referred to the case of Moseley v. Greene, #40526, which was an appeal from the Superior court of Cook county, out of which the instant case arose, so that it will be unnecessary to state the facts again. In our former opinion we held that under the facts as alleged in plaintiff's statement of claim, the sheriff was not justified in paying the $600 as ordered by the Superior court for the principal reason that plaintiff had alleged that he told the deputy sheriff he would appeal and that the deputy stated the money

Appellant,

v.

JOHN TOWER, DENIED STATES FIDELITY AND GUARANTY COMPANY,

Appellees.

SPECIAL 179

APPEAL FROM

APPELLATE COURT

OF CALIFORNIA.

NO. 8[illegible]

an. Petition for rehearing denied for filing in the court.

Plaintiff brought suit in the municipal court of Chicago against Alexander and Katrina S. Loesley, John Tower, former sheriff of Cook county, United States Fidelity and Guaranty Company and Thomas J. O'Brien, who was sheriff at the time the suit was brought, to recover $500. Tower and the surety company were the only defendants served. They filed their motion to strike plaintiff's statement of claim, the motion was sustained, the suit dismissed and plaintiff appealed. We reversed the judgment holding that the statement of claim stated a cause of action and remanded the cause. Loesley v. Tower, et al., 262App. Tower and the surety company filed their answer. The case was heard before the court without a jury, there was a finding and judgment in defendants' favor and plaintiff appeals.

In our former opinion we stated the facts concerning in detail and there referred to the case of Beasley v. Greene, 262App. which was an appeal from the superior court of Cook county, out of which the instant case arose, so that it will be unnecessary to state the facts again. In our former opinion we said that under pleadings as alleged in plaintiff's statement of claim, the sheriff was not justified in paying the $500 as ordered by the superior court for the principal reason that plaintiff had alleged that he told the deputy sheriff he would appeal and that the deputy stated the money

would be held until further notice was given plaintiff. In the instant case the sheriff and the surety denied this allegation and their counsel say this was substantially the only question involved. We think counsel's position is substantially correct.

The record discloses that on December 10, 1937, an order was entered by the Superior court holding plaintiff to be in contempt of court and directing the issuance of a mittimus unless plaintiff should deposit with the sheriff the $600 and a further order was entered that day staying the mittimus. April 21, 1938, the stay of the mittimus was terminated and plaintiff deposited the $600 with the sheriff. On Saturday, July 9, 1938, a hearing on plaintiff's petition was had and an order entered directing the sheriff to pay the money to named persons and on the following Monday, July 11, the sheriff gave his check for $600 which was paid July 13, by the bank on which it was drawn.

On the hearing in the instant case Greene testified that on July 9, 1938, just after the above mentioned order was entered, the courts and the clerk's office closed for the day and that he talked to Mr. McCarthy, a deputy sheriff in the sheriff's office and told him and another deputy sheriff who was there at the time that he was going to perfect his appeal from the judgment of the Superior court but that he could not serve his notice of appeal because the offices were closed; that "McCarthy told me that the money would not be paid out until I had an opportunity," and that at the same time he talked to Deputy Sheriff Lelivelt and told him that he was going to appeal, etc., just as he had told Mr. McCarthy, and that Mr. Lelivelt, said: "All right, we will not pay out the money until you perfect your appeal."

Plaintiff further testified that about 9 o'clock the following Monday morning July 11th, he served a copy of his notice of appeal on the sheriff. The notice is in the record before us. The next day, July 12, he filed it with the clerk of the Superior court;

would be held until further notice was given plaintiff. In the instant case the sheriff and the surety denied this allegation and their counsel say this was substantially the only question involved. We think counsel's position is substantially correct.

The record discloses that on December 10, 1927, an order was entered by the Superior court holding plaintiff to be in contempt of court and directing the issuance of a mittimus unless plaintiff should deposit with the sheriff the $800 and a further order was entered that day staying the mittimus. April 21, 1928, the stay of the mittimus was terminated and plaintiff deposited the $800 with the sheriff. On Saturday, July 9, 1928, a hearing on plaintiff's petition was had and an order entered directing the sheriff to pay the money to named persons and on the following Monday, July 11, the sheriff gave his check for $800 which was paid July 13, by the bank on which it was drawn.

On the hearing in the instant case Greene testified that on July 9, 1928, just after the above mentioned order was entered, the courts and the clerk's office closed for the day and that he talked to Mr. McCarthy, a deputy sheriff in the sheriff's office and told him and another deputy sheriff who was there at the time that he was going to perfect his appeal from the judgment of the Superior court but that he could not serve his notice of appeal because the offices were closed; that McCarthy told me that the money would not be paid out until I had an opportunity," and that at the same time he talked to Deputy Sheriff Halivelt and told him that he was going to appeal, etc., that as he had told Mr. McCarthy, and that Mr. Halivelt, said: "All right, we will not pay out the money until you perfect your appeal."

Plaintiff further testified that about 9 o'clock the following Monday morning July 11th, he served a copy of his notice of appeal on the sheriff. The notice is in the record before us. The next day, July 12, he filed it with the clerk of the Superior court;

that on the 25 or 26 of July he learned that the $600 had been paid July 11 and that he complained of this fact to Deputy Lelivelt who said that he could not help it. "They advised me that it had to be done." On cross-examination plaintiff testified that he talked to Deputy McCarthy on Saturday and either Deputy Lelivelt or Deputy Nelson, and one or the other of them on the following Monday; that he did not know these two men verycwell.

Joseph Lelivelt, the deputy called by defendants, testified that he was the chief deputy sheriff in charge of the sheriff's office and had talked with Greene three or four weeks before the trial (which the record shows was held September 22, 1943.) That he did not recall talking to Greene back in 1938; that the witness was not in the sheriff's office on Saturday, July 9, because that was his day off -- the way he took his vacation -- taking Saturdays off. He further testified: "McCarthy was a clerk in the office. He was not a deputy sheriff," and that he did not have authority to act as such. He then testified positively that he had no conversation with Greene in July, 1938.

Edward S. Nelson, called by defendants, testified that in July, 1938, he was assistant chief deputy sheriff; that McCarthy was not a deputy sheriff and that he had no authority to handle any money in any connection; that the witness did not talk to Greene Saturday, July 9, and he was positive he did not talk to him July 11, which was Monday, because he took Mondays off for his vacation.

The case was then adjourned a week or until September 29, 1943, when plaintiff called Edward D. McCarthy, who testified that he was a deputy sheriff and admitted his signature to the notice of appeal served by the sheriff's office on plaintiff, Greene, July 11, 1938; that he signed Sheriff Toman's name, then his own, as deputy sheriff, acknowledging receipt of the notice; that "I am sure I delivered that notice to one of the chief deputies of the sheriff. I do not remember this particular notice. If I received a notice from anybody, I always delivered it as soon as possible to

that on the 25 or 26 of July he learned that the $500 had been paid July 11 and that he complained of this fact to Deputy Lelivelt who said that he could not help it. "They advised me that it had to be done." On cross-examination plaintiff testified that he talked to Deputy McCarthy on Saturday and either Deputy Lelivelt or Deputy Nelson, and one or the other of them on the following Monday; that he did not know these two men very well.

Joseph Lelivelt, the deputy called by defendants, testified that he was the chief deputy sheriff in charge of the sheriff's office and had talked with Greene three or four weeks before the trial (which the record shows was held September 2d, 1943.) That he did not recall talking to Greene back in 1938; that the witness was not in the sheriff's office on Saturday, July 9, because that was his day off -- the way he took his vacation -- taking Saturdays off. He further testified: "McCarthy was a clerk in the office. He was not a deputy sheriff," and that he did not have authority to act as such. He then testified positively that he had no conversation with Greene in July, 1938.

Edward S. Nelson, called by defendants, testified that in July, 1938, he was assistant chief deputy sheriff; that McCarthy was not a deputy sheriff and that he had no authority to handle any money in any connection; that the witness did not talk to Greene Saturday, July 9, and he was positive he did not talk to him July 11, which was Monday, because he took Monday off for his vacation.

The case was then adjourned a week or until September 2d, 1943, when plaintiff called Edward C. McCarthy, who testified that he was a deputy sheriff and admitted his signature to the notice of appeal served by the sheriff's office on plaintiff, Greene, July 11, 1938; that he signed Sheriff Toman's name, then his own, as deputy sheriff, acknowledging receipt of the notice; that "I am sure I delivered that notice to one of the chief deputies of the sheriff. I do not remember this particular notice. If I received a notice from anybody, I always delivered it as soon as possible to

one of the chief deputies in charge." Plaintiff then introduced in evidence a photostatic copy certified to by the County clerk showing that Sheriff Toman had appointed Edward D. McCarthy deputy on December 3, 1934, and the affidavit of McCarthy that he would discharge the duties of deputy sheriff, sworn to before Edward S. Nelson, a notary public, who it seems to be conceded, was the deputy sheriff who testified as above mentioned.

Counsel for plaintiff in his brief says: "The only issue before the lower court on the trial of this case was whether there was a verbal agreement between the Sheriff and plaintiff that the Sheriff would not pay out the money. The plaintiff testified that he received such a promise from Deputy McCarthy, although he admitted that he knew McCarthy was not the head of the office. He further testified that he received such a promise from Deputies Nelson and Lelivelt, but admitted on cross-examination that he did not know which and that he might be mistaken. All three witnesses categorically denied making any such promise and denied having any conversation with plaintiff about this money until after it had been paid out."

The statement of counsel that all three deputy sheriffs denied Greene's testimony is not borne out by the record. Deputies Lelivelt and Nelson did positively deny that Greene had spoken to either of them but McCarthy gave no such testimony. In fact he was not interrogated on this question at all. So that we have the testimony of Greene that he told McCarthy on Saturday that he expected to appeal from the order of the Superior court and further that he also talked to another deputy either Mr. Lelivelt or Mr. Nelson, on Saturday and Monday advising the sheriff's office that he would appeal from the judgment of the Superior court. The evidence further shows that on Monday, July 11, shortly after 9 o'clock, Greene served

8.

one of the order deputies in court." Plaintiff then introduced in evidence a photostatic copy certified to by the county clerk showing that Sheriff Jones had deposited therein, before noon on December 5, 1924, and the affidavit of authority that he could discharge the duties of County Sheriff, sworn to before Thomas J. Nelson, a notary public, who it seems to be admitted, was the deputy sheriff who testified as above described.

Counsel for plaintiff in his brief says: "The only issue before the lower court on the trial of this case was whether there was a verbal agreement between the sheriff and plaintiff that the sheriff would not put out the money. The plaintiff testified that he received such a order from deputy sheriff, although he admitted that he knew deputy was not the head of the office. He further testified that he received such a order from deputies Nelson and Calvert, but admitted on cross-examination that he did not know which and that he might be mistaken. All these witnesses categorically denied having any such order and denied having any conversation with plaintiff about this money until after it had been paid out."

The statement of counsel that all these deputy sheriffs denied Sheriff's testimony is not borne out by the record. Deputies Calvert and Nelson did positively deny that Sheriff spoke and spoken to either of them but Deputy gave no such testimony. In fact he was not interrogated on this question at all. So much as have his testimony of Sheriff that he had authority to delegate that by appointment he appeal from the order of the superior court and further that he also failed to make or deputy either or. Calvert, or Nelson, or anything and authority to sheriff's office that he could appeal from the judgment of the superior court. The evidence further shows that on Monday, July 14, shortly after 3 o'clock, Jones served

notice of appeal on the sheriff's office. We think the evidence further is to the effect that the check had not been delivered by the sheriff's office at that time but later on the same day. No attention was paid by the sheriff's office to Greene's notice of appeal and that the check was not paid until two days later, July 13. We think it was the duty of the sheriff not to pay the money until the appeal had been disposed of either by prosecution or abandonment. Major v. The People, 40 Ill. App. 323.

Upon a consideration of all the evidence in the record we are clearly of opinion that the finding of the court in favor of defendants is against the manifest weight of the evidence.

The judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to enter judgment in favor of plaintiff and against defendants for $600.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, J., and Matchett, J., concur.

B. —

notice of appeal on the sheriff's office. In which the evidence further is to the effect that the check had not been delivered by the sheriff's office at that time but later on the same day. No attention was paid by the sheriff's office to defendant's notice of appeal and that the check was not paid until two days later, that is. We think it was the duty of the sheriff to pay the money until the appeal had been dismissed or either by prosecution or abandonment. Taylor v. Ins. Co. of Ill., 40 Ill. App. 386.

Upon a consideration of all the evidence in the record we are clearly of opinion that the finding of the court in favor of defendants is against the manifest weight of the evidence.

The judgment of the municipal court of Chicago is reversed and the cause remanded with directions to enter judgment in favor of plaintiff and against defendants for $800.

REVERSED AND REMANDED WITH DIRECTIONS.

Mckenzie, J., and Matchett, J., concur.

42986

ANNA RADWELL,
Appellee,

v.

CHARLES RADWELL,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

322 I.A. 179

A 88
371

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a decree of divorce entered December 15, 1942, and an order amending the decree entered February 10, 1943.

The record discloses that November 3, 1941, plaintiff filed her complaint for divorce against defendant alleging that the parties residents of Cook county, Illinois, were married December 24, 1922, at Jackson, Michigan; that they lived together as husband and wife until about March 1939, when defendant, without cause, deserted her; that there were four daughters born as a result of the marriage, aged 18, 16, 14 and 10 years. She prayed for a divorce and for support of herself and the minor children. December 9, counsel for defendant filed their appearance and December 30 there was a substitution of counsel, who on the same day, filed defendant's answer in which he denied that plaintiff was a resident of Cook county and averred that she resided at Hot Springs, Arkansas. Denied that the parties were lawfully married at Jackson, Michigan, December 24, 1922, or at any other time. On the next day, December 31, defendant filed a petition in which he alleged he had filed his answer to the complaint and denied that the parties had ever been married. That neither he nor his attorneys were present when an order was entered December 26, 1941, by which he was ordered to pay temporary alimony and solicitors' fees. That plaintiff was a resident of Hot Springs,

ANNA MARGETT,

Appellee,

v.

CHARLES MARGETT,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

88

SSSIA.1-9

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT:

By this appeal defendant seeks to reverse a decree of divorce entered December 10, 1943, and an order awarding the decree entered February 10, 1944.

The record discloses that November 5, 1941, plaintiff filed her complaint for divorce against defendant alleging that the parties residents of Cook county, Illinois, were married December 24, 1940, at Jackson, Michigan; that they lived together as husband and wife until about March 1942, when defendant, without cause, deserted her; that there were four daughters born as a result of the marriage, aged 10, 10, 12 and 14 years. She prayed for a divorce and for support of herself and the minor children. December 9, counsel for defendant filed their appearance and December 10 there was a substitution of counsel, and on the same day, filed defendant's answer in which he denied that plaintiff was a resident of Cook county and averred that she resided at Fort Benning, Georgia. Denied that the parties were lawfully married at Jackson, Michigan, December 24, 1940, or at any other time. On the next day, December 11, defendant filed a petition in which he alleged he had filed his answer to the complaint and denied that the parties had ever been married. That neither he nor his attorney were present when an order was entered December 10, 1941, by which he was ordered to pay temporary alimony and solicitors' fees. That plaintiff was a resident of Fort Benning,

Arkansas, and had property of the value of more than $35,000, and prayed that the order of December 26 be vacated and that no order be entered for temporary alimony or solicitors' fees until the question of marriage could be determined. January 2 a petition was filed by defendant's counsel in which he stated plaintiff's motion for temporary alimony and solicitors' fees came on to be heard on December 26 before Judge Sabath; that counsel for plaintiff was advised that he defendant's counsel was out of town and would not be able to attend the hearing before Judge Sabath on plaintiff's motion for temporary alimony and solicitor's fees and that counsel for plaintiff, in violation of his promise appeared before Judge Sabath and had the order entered awarding $7 per week temporary alimony and $50 solicitors' fees. January 2, 1942, an order was entered by Judge Sabath referring the matter to a special commissioner "to take proof and report to this court with his conclusions thereon especially as to the question of marriage between the parties."

On May 18, 1942, plaintiff filed her petition setting up what had taken place, including the order of December 26, 1941, and that defendant had failed to make the payment of temporary alimony and solicitors' fees as ordered, and the prayer was that defendant be adjudged to be in contempt of court, On the same day defendant filed his answer to the petition in which, among other things, he alleges that plaintiff was not entitled to alimony; that the matter was referred to a commissioner and that hearings were there had; that testimony was taken by the commissioner and that plaintiff had failed to prove the marriage. That she had promised to pay one-half of the court reporter's fees in writing up the transcript of the evidence taken before the commissioner and that it was her duty to produce the transcript of the evidence before the commissioner, and he therefore requested the court to deny her petition (praying that he be held in contempt of court.) May 22, 1942, plaintiff filed

[illegible], and had property of the value of more than $50,000, and proved that the order of November 18 was issued and that no order be entered for temporary alimony or solicitors' fees until the question of marriage could be determined. January 2 a petition was filed by defendant's counsel in which he asked plaintiff's motion for temporary alimony and solicitors' fees even so to be heard on December 22 before Judge Smith; that counsel for plaintiff was advised that he (counsel) was out of town and would not be able to attend the hearing before Judge Smith on plaintiff's motion for temporary alimony and solicitor's fees and that counsel for plaintiff, in violation of the rules, approached before Judge Smith and had the order entered granting if per week temporary alimony and $50 solicitors' fees. January 5, 1921, an order was entered by Judge Smith referring the matter to a special commissioner "to take proof and report to this court with his conclusions thereon especially as to the question of marriage between the parties."

On Jan 18, 1921, plaintiff filed her petition setting up that had taken place, including the order of December 2, 1921, and that defendant had failed to make the payment of temporary alimony and solicitors' fees as ordered, and the answer was that defendant be adjudged to be in contempt of court. On the same day defendant filed his answer to the petit or in chief, among other things, he alleged that plaintiff was not entitled to alimony; that the matter was referred to a commissioner and that hearings were there had; that testimony was taken by the commissioner and that plaintiff had failed to prove the marriage. That she had promised to pay one-half of the court reporter's fees in setting up the transcript of the evidence taken before the commissioner and that it was her duty to produce the transcript of the evidence before the commissioner, and he therefore requested the court to deny her petition (meaning that be be held in contempt of court.) May 23, 1921, plaintiff filed

a reply to this answer averring that the common law marriage had been entered into in the state of Michigan on December 24, 1922; that defendant had deserted her about March, 1939. Then follow allegations of the allowance of the temporary alimony and solicitors' fees and further that the original counsel who represented defendant had stated to plaintiff's attorney that plaintiff had inherited a large sum of money and that defendant was willing to allow plaintiff to prove up her case for divorce if she paid him $2,000, which she refused to do. That thereafter, December 26, 1941 the order for temporary alimony and solicitors' fees was entered by the court. Then follows a recitation of what was alleged to have taken place in the case; that the cause was referred to a special commissioner and the court refused to enter an order vacating the order of December 26; that due to the absence of counsel for defendant and to the fact that plaintiff had been confined to her bed because of illness, hearings were had at various times before the special commissioner until February 18, 1942, when a settlement was proposed by defendant through his counsel, that defendant would not contest the divorce provided plaintiff agreed to waive alimony and support of the children, solicitors' fees and costs. That thereafter Judge Sabath was out of the city and the matter was set for hearing before Judge Lupe March 4, 1942. That counsel for defendant advised plaintiff's counsel that the proposed settlement would not be carried out. Other matters were set up which we think it unnecessary to mention here.

The next that appears in the record is that on December 10, 1943, the report of the proceedings taken before the special commissioner was filed although on the face of the report it is marked filed by the clerk "December 13, 1943." This document consist of 274 pages which purport to be the evidence taken before the commissioner. Following this is the commissioner's report filed

a reply to this answer averring that the common law marriage had been entered into in the state of Michigan on December 21, 1941; that defendant had deserted her about March, 1942. Then follow allegations of the allowance of the temporary alimony and solicitors' fees and further that the original counsel who represented defendant had stated to plaintiff's attorney that plaintiff had inherited a large sum of money and that defendant was willing to allow plaintiff to prove up her case for divorce if she paid him $2,000, which she refused to do. That thereafter, December 26, 1941 the order for temporary alimony and solicitors' fees was entered by the court. Then follows a recitation of what was alleged to have taken place in the case; that the cause was referred to a special commissioner and the court refused to enter an order vacating the order of December 26; that due to the absence of counsel for defendant and to the fact that plaintiff had been confined to her bed because of illness, hearings were had at various times before the special commissioner until February 18, 1942, when a settlement was proposed by defendant through his counsel, that defendant would not contest the divorce provided plaintiff agreed to waive alimony and support of the children, solicitors' fees and costs. That thereafter Judge Kabath was out of the city and the matter was set for hearing before Judge Lupe March 4, 1942. That counsel for defendant advised plaintiff's counsel that the proposed settlement would not be carried out. Other matters were set up which we think it unnecessary to mention here.

The next that appears in the record is that on December 10, 1942, the report of the proceedings taken before the special commissioner was filed although on the face of the report it is marked filed by the clerk "December 12, 1942." This document consists of 274 pages which purport to be the evidence taken before the commissioner. Following this is the commissioner's report filed

May 26, 1942. In this report the commissioner recites that the parties appeared before him by counsel and evidence was introduced. He found that plaintiff in her complaint alleged her marriage with defendant on December 24, 1922, at Jackson, Michigan, and continued to cohabit with him until March 1939; that there were four daughters born as a result of the marriage aged 18, 16, 14 and 10; that "from the evidence adduced before me at said hearings, the said CHARLES RADWELL held ANNA RADWELL out as his wife and that he had baptized the aforesaid children under his name and he signed the said baptismal certificates; that at all times he held the said ANNA RADWELL out as his wife and that in the various properties that he owned he joined the name of ANNA RADWELL as his wife and in the extension agreement of the mortgage, she also was known as the wife of CHARLES RADWELL and in his various applications for memberships in various organizations she was also known and referred to as ANNA RADWELL, the wife of CHARLES RADWELL." That defendant's testimony was to the effect that they were never legally married in Illinois; that plaintiff was pregnant "and he took her to Jackson, Michigan to have the said child; that he came back to Chicago, *** and left the plaintiff *** in Jackson, Michigan; that after the birth of the first child in May of 1923, the plaintiff came back to Chicago and made her home with the defendant and they have lived on and off for many years thereafter." That the particular question before the commissioner was the marriage of the parties; that the parties "had a reporter taking down the evidence but did not present the transcript of the *** evidence." The commissioner then finds that under the law of Illinois as announced in Peirce v. Peirce, 379 Ill. 185, there was not a valid marriage. He further finds that the parties "merely went to Michigan which was a common law state and which recognizes common law marriages was merely for the purpose of evading the laws of the State of Illinois."

ber 26, 1944. In this report the usual finder recites that the parties appeared before him by counsel and evidence was introduced. He found that plaintiff in her complaint alleged her marriage with defendant on December 24, 1938, at Jackson, Michigan, and continued to cohabit with him until about 1939; that there were four children born as a result of the marriage aged 14, 12, 11 and 10; that "from the evidence adduced before me in this hearing, the said DONALDS MOORE could only RECEIVE out of his wife and that he had deprived the aforesaid children under his care and in fact the said Beatrice certificates; that at all times by said the said ANNA MOORE, out of his wife and that in the various properties that he owned he joined the name of ANNA MOORE as his wife and in the extension agreement of the mortgage, and also under as the wife of DONALDS MOORE and in the various applications for membership in various organizations she was also known and referred to as ANNA MOORE, the wife of DONALDS MOORE." Plaintiff's testimony was to the effect that they were never legally married in Illinois; that plaintiff was pregnant when he took her to Jackson, Michigan to have the said child; that he came back to Chicago, and left the plaintiff and her in Jackson, Michigan; that after the birth of the first child in May of 1938, the plaintiff came back to Chicago and made her home with the defendant and they have lived on and off for many years thereafter. Upon the jurisdictional question before the commissioner was the allegation of the petition; that the parties "had a proper Illinois term the evidence but did not present the transcript of the ~~the~~ evidence." The commissioner then finds that under the law of Illinois as announced in Lorenz v. Lorenz, 271 Ill. 168, there was not a valid marriage. He further finds that the parties merely went to Michigan where as a common law state and which recognizes common law marriages was merely for the purpose of evading the laws of the state of Illinois.

On the same day, May 26, 1942, the court entered an order that the hearing on the return of the rule to show cause why defendant should not be adjudged in contempt of court for failure to pay alimony and solicitors' fees, be continued until June 15, 1942, plaintiff was given leave to file her objections to the report and the matter was set for hearing on June 15, 1942, at 10 a.m. It was further ordered that defendants's motion to approve the commissioner's report and to dismiss for want of equity was set for hearing at the same time by Judge Sabath.

June 9, 1942, plaintiff filed her objections to the commissioner's report, the principal objection being that he had failed to find there was a valid marriage entered into by the parties. June 15 an order was entered by Judge Sabath reciting that the matter came on to be heard on the special commissioner's report and the objections thereto and upon the rule on the defendant to show cause why he should not be adjudged in contempt of court; and that the report of the commissioner be approved and the cause dismissed for want of equity. And it was ordered that the hearing on these motions "be continued to be set on the next fall contested calendar for trial."

June 23, 1942, there appears in the record a notice which purports to be served by counsel for plaintiff on counsel for defendant asking that the cause be placed on the contested trial calendar pursuant to the rules of the Superior court. October 21, 1942, an order was entered by Judge Graber, who was hearing a contested trial calandar on which the cause appeared, in which it is recited that the matter came on for hearing on motion of counsel for plaintiff and it was ordered that the cause be set for trial at 11 o'clock, November 30, 1942, without further notice. On November 30 the cause was heard before Judge Graber. Plaintiff, her counsel and witnesses appeared but no one on behalf of defendant. A number of witnesses were sworn and testified, at the conclusion of which,

On the same day, May 26, 1942, the court entered an order that the hearing on the return of the rule to show cause why defendant should not be adjudged in contempt of court for failure to pay alimony and solicitors' fees, be continued until June 15, 1942, plaintiff was given leave to file her objections to the report and the matter was set for hearing on June 15, 1942, at 10 a.m. It was further ordered that defendant's motion to approve the commissioner's report and to dismiss for want of equity was set for hearing at the same time by Judge Babbitt.

June 9, 1942, plaintiff filed her objections to the commissioner's report, the principal objection being that he had failed to find there was a valid marriage entered into by the parties. June 15 an order was entered by Judge Babbitt recalling that the matter came on to be heard on the special commissioner's report and the objections thereto and upon the rule on the defendant to show cause why he should not be adjudged in contempt of court; and that the report of the commissioner be approved and the cause dismissed for want of equity. And it was ordered that the hearing on these motions "be continued to be set on the next full contested calendar for trial."

June 22, 1942, there appears in the record a notice which purports to be served by counsel for plaintiff on counsel for defendant asking that the cause be placed on the contested trial calendar pursuant to the rules of the superior court. October 15, 1942, an order was entered by Judge Graber, who was hearing a contested trial calendar on which the cause appeared, in which it is recited that the matter came on for hearing on motion of counsel for plaintiff and it was ordered that the cause be set for trial at 11 o'clock, November 30, 1942, without further notice. On November 30 the cause was heard before Judge Graber. Plaintiff, her counsel and witnesses appeared but no one on behalf of defendant. A number of witnesses were sworn and testified, at the conclusion of which,

the court told counsel for plaintiff to prepare a decree and to let the order for $7.50 a week for temporary alimony stand, and the question of solicitors' fees was raised. Counsel for plaintiff said: "Now, they filed nothing here except an answer, and I might say, for the purpose of the court's information, Mr. Radwell informed his wife, so she tells me, that he didn't want to contest the matter. THE COURT: Well, they are not here. Counsel for plaintiff: No. And this is the third time, and I just wanted the court to know our position in the matter." And the solicitor's fees were fixed at $150.

December 15, 1942, the certificate of evidence was filed and a decree of divorce entered.

An examination of the evidence taken before the chancellor discloses that the fact that the matter had been referred to a special commissioner who had taken evidence and made up his report was not brought to the attention of the court and was in no way mentioned. Nor was any evidence offered indicating that the marriage was a common law marriage which took place in Michigan.

The next that appears in the record is that on February 2, 1943, pursuant to notice, defendant filed a petition in which it is set up that the cause was originally assigned to Judge Sabath; that defendant had filed his answer denying the marriage and various petitions questioned the jurisdiction of the court to enter the order for temporary alimony and solicitor's fees, and that Judge Sabath had referred the matter to a special commissioner, etc. That the parties had appeared before the commissioner by their counsel, witnesses appeared and the commissioner made his report May 26,1942, in which he found that there was not a valid marriage entered into between the parties; that thereafter the matter had been continued until the fall of 1942, to be heard on the contested trial calendar. That after notice to defendant or his counsel, the divorce suit was heard on November 30, 1942, before Judge Graber, who had not been

the court told counsel for plaintiff to prepare a decree and by let the order for 17.00 a week for temporary alimony stand, and the question of solicitors' fees reserved. Counsel for plaintiff said: "Now, they filed nothing here except an answer, and I think say, for the purpose of the court's information, Mr. Sewell informed his wife, so she tells me, that he didn't want to contest the matter. The Court: Well, they are not here. Counsel for plaintiff: No. And this is the third time, and I just wanted the court to come our position in the matter." and the solicitors fees were fixed at $150.

December 15, 1943, the certificate of evidence was filed and a decree of divorce entered.

In examination of the evidence taken before the chancellor disclosed that the fact that the matter had been referred to a spiritual counsellor was not taken evidence and took up his report was not brought to the attention of the court, and was in no way mentioned. Nor was any evidence offered indicating that the marriage was a common law marriage which took place in Alabama.

The part that appears in the record is that on February 1, 1943, pursuant to notice, defendant filed a petition in which it is set up that the cause was originally instituted in Cuba Island; that defendant had filed his answer denying the marriage and various petitions questioned the jurisdiction of the court to make the order for temporary alimony and solicitor's fees, and that Judge Roberts had referred the matter to a marital counsellor, who. That the parties had appeared before the counsellor by their agents, witnesses appeared and the counsellor made his report and [illegible], in which he found that there was not a valid marriage entered into between the parties; that therefore the matter had been satisfactorily until the fall of 1942, to be heard as the pendency that relative. That after notice to defendant or the counsel, the divorce bill was heard on November 30, 1943, before Judge Roberts, who had not been

informed of what had been done by the special commissioner. That the decree of divorce was entered December 15, 1942, on the evidence offered by plaintiff; that there was no hearing on the commissioner's report although objections to it were filed by plaintiff and that this was a fraud and imposition on the court. That neither defendant nor his counsel had any knowledge of the entry of the decree until January 30, 1943, when the sheriff of Cook county attempted to serve papers on defendant for the payment of alimony; and the prayer was that the decree be vacated and set aside and the cause reinstated and set for hearing on the commissioner's report and the objections thereto.

On the same day an order was entered by Judge Graber giving defendant leave to file his petition to review and vacate the decree of December 15, 1942. That plaintiff answer it within five days and the matter was set for hearing on February 8, 1943. February 8, plaintiff filed a written answer to defendant's petition in which she set up the relationship of the parties, the various proceedings had in court, the propositions for settlement made by defendant - - that he was willing, for $2,000, to permit plaintiff to prove up her divorce without contest provided she did not ask for alimony or solicitors' fees, and that afterward defendant told plaintiff he would not object to the divorce if she paid $200 to defendant's counsel. A great many other matters are set up as to what took place in and out of court. That by lapse of time since the decree was entered, the court had lost jurisdiction to vacate it. Affidavits of two of the elder daughters were attached to and made a part of the answer. The matter came on for hearing on February 8, 1943, before Judge Graber, both parties and their counsel were present. Witnesses were interrogated, principally by the court, in which we think it appears that defendant admitted he was the father of the four daughters and in response to a question put to him by the court he stated that they had lived together in Chicago for

informed of what had been done by the special commissioner. That the decree of divorce was entered December 1, 1943, on the evidence offered by plaintiff; that there was no hearing on the commissioner's report although objections to it were filed by plaintiff and that this was a fraud and imposition on the court. That neither defendant nor his counsel had any knowledge of the entry of the decree until January 30, 1944, when the sheriff of Cook county attempted to serve process on defendant for the payment of alimony; and the process was that the decree be vacated and set aside and the cause reinstated and set for hearing on the commissioner's report and the objections thereto.

On the same day an order was entered by Judge Graber giving defendant leave to file his petition to review and vacate the decree of December 1, 1943. That plaintiff answer it within five days and the matter was set for hearing on February 3, 1944. February 8, plaintiff filed a written answer to defendant's petition in which she set up the relationship of the parties, the various proceedings had in court, the propositions for settlement made by defendant - that he was willing, for $2,000, to permit plaintiff to prove up her divorce without contest provided she did not ask for alimony or solicitors' fees, and that afterward defendant told plaintiff he would not object to the divorce if she would go to Reno-Nant's a friend. A great many other matters were set up in the answer took place in and out of court. Just at issue of time since the decree was entered, the court had lost jurisdiction to vacate it. Affidavits of two of the elder daughters were attached to and made a part of the answer. The matter came on for hearing on February 3, 1943, before Judge Graber, both parties and their counsel were present. Witnesses were interrogated, principally by the court, to which we think it appears that defendant admitted or was not denied of the four daughters and in response to a question put to him by the court he stated that they had lived together in Chicago for

about 10 years. Other evidence was heard but we think it unnecessary to discuss it further here. At the conclusion of the hearing the court sustained plaintiff's objections to the commissioner's report; said he would modify the decree by eliminating all allowance for alimony or solicitors' fees. Two days later, viz., February 10, 1943, an order was entered amending the decree, as above stated. The report of proceedings was not filed with a clerk of the Superior court until December 13, 1943.

The next that appears in the record is that November 15, 1943, defendant filed his praecipe for record.

December, 13, 1942, which was the last day of the year after the divorce was entered, defendant filed the record and a petition, in this court for leave to appeal from the original decree and from the decree as amended. Leave was granted and afterward briefs were filed on behalf of both parties.

Counsel for defendant, who were not the counsel who represented him in the trial, contend that the trial court was without jurisdiction to enter the decree "for the reason that there was not sufficient evidence of plaintiff's residence in the County of Cook and State of Illinois for one full year prior to the filing of her complaint for divorce in view of the allegations of the defendant's answer that the plaintiff was a resident of Hot Springs, Arkansas, and in view of the proofs taken before the Special Commissioner, and before the trial court, to substantiate the findings in the Decree that the plaintiff was an actual resident of the County of Cook." In support of this counsel say: "plaintiff cannot contend that her residence follows that of the defendant. To so contend we must first have proof that the plaintiff and the defendant are husband and wife. She must prove a valid marriage."

The record discloses that the parties are of Lithuanian descent of little education and spoke and understood our language with considerable difficulty - an interpreter was necessary; that

about 10 years. Other evidence was heard but we think it unnecessary to discuss it further here. At the conclusion of the hearing the court sustained plaintiff's objections to the master's report; said he would modify the decree by eliminating all allowance for alimony or solicitors' fees. Two days later, viz., February 10, 1942, an order was entered amending the decree, as above stated. The report of proceedings was not filed with a clerk of the superior court until December 15, 1942.

The next that appears in the record is that November 16, 1942, defendant filed his praecipe for record.

December 15, 1942, which was the last day of the year after the divorce was entered, defendant filed the record and a petition, in this court for leave to appeal from the original decree and from the decree as amended. Leave was granted and afterward briefs were filed on behalf of both parties.

Counsel for defendant, who were not the counsel who represented him in the trial, contend that the trial court was without jurisdiction to enter the decree "for the reason that there was not sufficient evidence of plaintiff's residence in the county of Cook and state of Illinois for one full year prior to the filing of her complaint for divorce in view of the allegations of the defendant's answer that the plaintiff was a resident of Mt. Morris, Illinois, and in view of the proofs taken before the special commissioner, and before the trial court, to substantiate the findings in the decree that the plaintiff was an actual resident of the County of Cook." In support of this counsel say: "Plaintiff cannot contend that her residence follows that of the defendant. To so contend we must first have proof that the plaintiff and the defendant are married and wife. She must prove a valid marriage."

The record disclosed that the parties are of Lithuanian descent of little education and spoke and understood our language with considerable difficulty - an interpreter was necessary; that

they lived in Chicago; that they had been going together, plaintiff became pregnant and brought a proceeding in the Municipal court of Chicago, which her then counsel designated (when he testified before the chancellor on the divorce hearing) a bastardy case. That about Thanksgiving, 1922, defendant had plaintiff go to Jackson, Michigan, where she stayed with defendant's cousin who was living there; that defendant visited her and stayed there off and on about 10 days during which period they entered into a common law marriage which it seems to be agreed, was a valid marriage in Michigan. That the child was born February 20, 1923, at a hospital in Jackson; that shortly thereafter plaintiff, at defendant's request, returned to Chicago and they lived together as husband and wife for a period of years during which time three other daughters were born to them. That defendant was conducting a grocery and meat market on the South Side of Chicago; that plaintiff and the children went to Hot Springs in 1935; that her health was not good; that defendant intended to sell out his business in Chicago and go to Hot Springs to live with them.

The attorney who represented plaintiff in the Municipal court case, above referred to, testified on the hearing of the divorce case that he had known the parties since 1922; that he visited their home in Chicago hundreds of times; that during the latter part of November or December the parties called at his office at 10 South LaSalle street, Chicago and said they wanted him to go to the Municipal court and dismiss the bastardy case because they had just been married in Michigan; that defendant often told the witness that the four children were his; that they lived at 6108 or 6110 South State Street, Chicago; that defendant was then running a grocery store.

A number of other witnesses testified on the divorce hearing and a number also testified before the special commissioner as well as before the chancellor who had heard the divorce case on defendant's petition to vacate and set aside the divorce decree, above mentioned.

they lived in Chicago; that they had been going together, plaintiff became pregnant and brought a proceeding in the municipal court of Chicago, which her then counsel described (even in testifying before the chancellor on the divorce hearing) a bastardy case. That about Thanksgiving, 1923, defendant had plaintiff go to Jackson, Michigan, where she stayed with defendant's sister, who was living there; that defendant visited her and stayed there off and on about 10 days during which period they entered into a common law marriage which it seems to be agreed, was a valid marriage in Michigan. That the child was born February 23, 1924, at a hospital in Jackson; that shortly thereafter plaintiff, at defendant's request, returned to Chicago and they lived together as husband and wife for a period of years during which time three other daughters were born to them. That defendant was conducting a grocery and meat market on the South Side of Chicago; that plaintiff and the children went to live perhaps in 1927; that her health was not good; that defendant intended to sell out and relinquish Chicago and go to Hot Springs to live with them.

The attorney who represented plaintiff in the municipal court case, above referred to, testified on the hearing of this divorce case that he had known the parties since 1927; that he visited their home in Chicago hundreds of times; that during the latter part of November or December the plaintiff called at his office at 20 South Laflin street, Chicago and said they wanted him to go to the municipal court and dismiss the bastardy case because they had just been married in Michigan; that defendant then told me stated that the four children were his; that they lived at 3134 or 3136 South State street, Chicago; that defendant was then running a grocery store.

A number of other witnesses testified on the divorce hearing and a number also testified before the special commissioner as well as before the chancellor who had heard the divorce case on defendant's petition to vacate and set aside the divorce decree, above mentioned.

But we think it would serve no useful purpose to discuss the evidence further for we are of opinion it shows that the parties entered into a common law marriage which was valid in the state of Michigan.

The special commissioner found, as we have above quoted, that the common law marriage entered into in Michigan by the parties was not valid because they merely went to Michigan for the purpose of evading the laws of Illinois. We think this conclusion is wholly unwarranted. There is not a word in the record tending to show that either party knew anything about the law of Illinois or Michigan. There is no evidence that they went to Michigan to evade the laws of Illinois or any other state. There was no reason why they could not validly be married in Illinois. In fact, counsel for defendant in their briefs say: "The only purpose of the trip to Jackson, Michigan was to provide a place for the birth of the expected child with no intention of remaining in Michigan and taking up permanent residence there." This is a correct statement of what is disclosed by the record. In these circumstances the action of the court in sustaining plaintiff's exceptions to the commissioner's report was proper and the only action the record would sustain.

Counsel for defendant say that the conduct of counsel for plaintiff when the divorce matter came on for hearing before Judge Graber in failing to apprise the court of the special commissioner's report was reprehensible. We think this contention must be sustained. Counsel should have advised Judge Graber of what had taken place. His excuse for failing to do so is that the case had been continued by Judge Sabath until the fall of 1942, as heretofore mentioned, and afterward pursuant to notice given to counsel for defendant the cause had been placed on the contested trial calendar for the fall; that later it was noticed a number of times in the Chicago Daily Law Bulletin, showing when and where the case would be heard and that it was the duty of defendant's counsel to know that the case was set and the time when it would be heard. We think there is

but we think it would serve no useful purpose to discuss the evidence further for we are of opinion it shows that the parties entered into a common law marriage which was valid in the state of Michigan.

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Counsel for defendant say that the counsel of counsel for plaintiff when the divorce matter came on for hearing before Judge Graber in failing to acquire the court of the special commissioner's report was reprehensible. We think this contention must be overruled. Counsel should have advised Judge Graber of what had taken place. His excuse for failing to do so is that the case had been continued by Judge Graber until the fall of 1941, on interlocutory continuance, and afterward upon motion given to counsel for defendant the cause had been placed on the contested trial calendar for the fall; that later it was noticed a number of times in the Chicago Daily Law Bulletin, showing when and where the case would be heard and that it was the duty of defendant's counsel to know that the case was set and the time when it would be heard. We think there is

some merit in this contention. It was the duty of counsel for defendant obviously to know the orders that had been entered, the notice served on them and that the case was placed on the contested trial calendar and to notice the announcement made in the Law Bulletin. But this does not excuse the conduct of counsel for plaintiff which we condemn.

A further contention is made by counsel for defendant that when the matter of vacating the decree of divorce came on for hearing before Judge Graber on February 8, 1943, and during that hearing, the evidence taken before the commissioner was not presented to the court. There is some merit to this contention although it is not clear from the record just what was before the court. The commissioner's report had been filed many months before that hearing and a great deal was said on the hearing before the court about the commissioner's report and of the evidence taken by the commissioner. In these circumstances we are unable to say that the court was not warranted in sustaining plaintiff's objection to the commissioner's report.

We have found no complaint by counsel for either party that the court was without jurisdiction to modify the decree of divorce as was done more than 30 days after the decree was entered.

For the reasons stated, the decree and the order amending it appealed from, are affirmed.

AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

II.

some merit in this contention. It was our duty at current our defendant obviously to move the judge that we have contested, the motion served on them and that the jury was issued on the contested trial whether and to notice the announcement made in our in bulletin. But this does not change the judgment of against the plaintiff which is wrong.

A further contention is made by counsel for defendant that when the matter of vacating the decree of divorce came on for hearing before this court on February 8, 1921, and during that proceeding the evidence taken before the commissioner was not presented to the court. There is some merit to this contention although it is not clear from the record just what was before the court. The commissioner's report had been filed many months before that hearing and a great deal was said on the hearing before the court about the commissioner's report and of the evidence taken by the commissioner. In these circumstances we are unable to say that the court was not warranted in overruling plaintiff's objection to the commissioner's report.

We have found no complaint by counsel for plaintiff that the court was without jurisdiction to modify the decree of divorce as was done more than 60 days after the decree was entered.

For the reasons stated, the orders and the order awarding it appealed from, are affirmed.

Affirmed.

Alexander, J., and Dietzman, J., concur.

42666

MARY DOWGIALOWICZ,
Appellant,

v.

KEISTUTO SAVINGS & LOAN ASSOCIATION,
et al.,
Appellees.

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METROPOLITAN STATE BANK,
Plaintiff,

v.

DAVID J. A. HAYES, et al.,
Defendants.

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On Appeal of BENJAMIN H. BLACK and ARTHUR H. BEERMANN and separate appeal of MARY DOWGIALOWICZ.

322 I.A. 180

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

84
322 A

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

These appeals call for a decision concerning the claims of two firms of attorneys for liens against proceeds of litigation recovered by Mary Dowgialowicz in suits consolidated for hearing in the Superior Court of Cook County. The firm of Byrne, Kelley & Grish claims a lien under a written contract of employment entered into between them and Mary on July 23, 1941. By amendment of their pleadings they also claim on a quantum meruit. Black & Beermann claim a lien under a contract made between them and Mary on August 15, 1941. A final decree having been entered on the litigation by way of settlement between the other parties, the question of the rights of these claimants for attorney's liens was reserved. The parties were heard and their rights determined by a supplemental decree entered December 14, 1942. As to the claim of Byrne, Kelley & Grish the lien was allowed on a quantum meruit basis for $2500. The claim of Black & Beermann was disallowed on the theory that their

MARY DONIALOWICZ,
Appellant,

v.

KEISTONE-SAVINGS & LOAN ASSOCIATION,
et al.,
Appellees.

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METROPOLITAN STATE BANK,
Plaintiff,

v.

DAVID L. R. MAYER, et al.,
Defendants.

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On Appeal of SAMUELS H. BLACK and
ARTHUR H. BERGMAN and separate
appeal of MARY DONIALOWICZ.

3929 L.A. 180

APPEAL FROM
MONROE COUNTY,
Judge Presiding.

MR. JUSTICE ALBERT DELIVERED THE OPINION OF THE COURT:

These appeals call for a decision concerning the claims of two firms of attorneys for liens against proceeds of litigation recovered by Mary Doniałowicz in suits consolidated for hearing in the Superior Court of Cook County. The firm of Byrne, Kelly & Grish claims a lien under a written contract of employment entered into between them and Mary on July 19, 1941. By amendment of their pleadings they also claim on a quantum meruit. Black & Bergman claim a lien under a contract made between them and Mary on August 18, 1941. A final decree having been entered on the litigation by way of settlement between the other parties, the question of the rights of these claimants for attorney's liens was reserved. The parties were heard and their rights determined by a supplemental decree entered December 1, 1944. As to the claim of Byrne, Kelly & Grish the lien was allowed on a quantum meruit basis for $2500. The claim of Black & Bergman was disallowed on the theory that their

contract of August 15 was unconscionable and unenforceable. Black & Beerman ask that the findings of the supplementary decree as to their claim be reversed and the contract held enforceable. Mary contends the decree should be affirmed as to Black & Beermann. By her cross-appeal she seeks to reverse the finding and judgment in favor of Byrne, Kelley & Grish.

We think it well to briefly state undisputed facts about the employment of these attorneys. For years prior to July 2, 1941, Stanley Dowgialowicz (at that time about 86 years of age) conducted a dairy business at 3251 South Emerald Avenue in Chicago. He had been married; his wife was dead. The children (apparently grown up) were no longer at the parental home. He did not live with his family. He was by birth a Lithuanian. The business was located in a Chicago Lithuanian community, where the language of Lithuania was in common use. Mary Dowgialowicz, whose maiden name was Mary Kaciusis, also a Lithuanian, became his housekeeper and the manager of his dairy business. The business was worth probably $75,000. July 2, 1941, Stanley's daughter, Mrs. Hattie Wabol, filed a petition in the Probate Court to have her father declared incompetent. She obtained an order that he was. David J. A. Hayes was appointed conservator of his person and estate. Hayes qualified and took possession of the property. Three days later Stanley and Mary procured a marriage license and together took marriage vows. Legal war then began on many fronts.

There was a citation against Mary in the Probate Court to discover and recover assets; restraining orders, etc.; a petition for <u>habeas corpus</u> filed by Mary to secure, if possible, the possession of her supposed husband; a bill filed by the conservator to annul the marriage; a bill filed by Mary to establish a partnership between her and Stanley in the business. One month after their alleged marriage (namely, August 5, 1941) Stanley died intestate, leaving him surviving as his only heirs at law and next of kin his two

contract of August 18 was unconscionable and unenforceable. Since a German man that the findings of the supplementary hearing as to their claim be reversed and the contract held enforceable. Mary contends the decree should be affirmed so to place a German. By her cross-appeal she seeks to reverse the finding and judgment in favor of Syrus, Sally's orphan.

To think it well to briefly state undisputed facts about the employment of these attorneys. For years prior to July 2, 1941, Stanley Dowgialowicz (at that time about 50 years of age) conducted a dairy business at 3001 South Central Avenue in Chicago. He had been married; his wife was dead. The children (apparently grown up) were no longer at the parental home. He did not live with his family. He was by birth a Lithuanian. The business was located in a Chicago Lithuanian community, where the language of Lithuania was in common use. Mary Dowgialowicz, whose maiden name was Mary Zaciuria, also a Lithuanian, became his housekeeper and the manager of his dairy business. The business was worth approximately $75,000. July 2, 1941, Stanley's daughter, Mrs. Sylvia Yusol, filed a petition in the Probate Court to have her father declared incompetent. She obtained an order that he see David J. S. Joyce as an alleged conservator of his person and estate. Joyce qualified and took possession of the property. Three days later Stanley and Mary procured a marriage license and together took marriage vows. Legal war then began on many fronts.

There was a citation against Mary in the Probate Court to discover and recover assets; restraining orders, etc.; a petition for habeas corpus filed by Mary to secure, if possible, the possession of her asserted husband; a bill filed by the conservator to annul the marriage; a bill filed by Mary to establish a partnership between her and Stanley in the business. One month after their alleged marriage (namely, August 8, 1941) Stanley died intestate, leaving him surviving as his only heirs at law and next of kin his two

daughters, Hattie Wabol and Lottie Miniat, and his two sons, Michael and Louis Dowgialowicz. Hayes was appointed administrator of the estate of Stanley. The attorneys Byrne, Kelley & Grish and Black & Beermann, who had beeneemployed by Mary, served notices of their claim for lien for attorney's fees under the statute.

September 30, 1941, the Metropolitan State Bank filed its suit No. 41 S 14626 in the Superior Court by way of interpleader and offered to deposit the money in its possession with the clerk of the court. By January 30, 1942, plaintiff had employed a different attorney, who filed her complaint in the Superior Court in chancery, No. 42 S 1452, whereby she sought to enjoin Hayes from interfering with her ownership of stock in the Keistuto Savings & Loan Association, and on January 17, 1942, her counterclaim in the interpleader action in which she sought similar relief. In her bill and counterclaim she also asked a finding that neither of the firms of attorneys had any lien upon her property for their services. These were the actions consolidated.

In these suits a decree was entered with the consent of all the parties financially interested, whereby Mary Dowgialowicz became the owner of properties said to be of the value of $25,565.49. The decree, however, reserved for further consideration the claims of these two firms of attorneys. Afterwards evidence was taken upon the issues as to them. On December 14, 1942, a supplementary decree was entered adjudicating their rights. By paragraph 5 of that decree the court found as to the claim of Black & Beermann, Mary had proved the allegations of her pleadings by a preponderance of the evidence; that the writing on which the claimants relied as a contract between them was void for want of equity, and denied their claim to a lien. Black & Beermann relied wholly on the contract in writing with Mary executed on August 15, 1941. They made no plea on the <u>quantum meruit</u> basis.

The answer of Mary denies that any other defendant has any lien upon the property but admits that other defendant attorneys have performed certain legal services for which thay may have some

daughters, Nettie Nobel and Lottie Linter, and his two sons, Alexander and Louis Dougladoice. Joyce was appointed administrator of the estate of Stanley. The attorneys firms, Kelly & Grant and Black & Beerman, who had been employed by Mary, served notice of their claim for lien for attorney's fees under the statute.

September 20, 1941, the metropolitan trust bank filed its suit No. 41 - 1 filed in the superior court by way of interpleader and offered to deposit the money in its possession with the clerk of the court. By a marry 20, 1942, plaintiff had employed a different attorney, who filed her complaint in the superior court in Monroe, No. 42 - 1 1428, whereby she sought to enjoin Boyce from interfering with her ownership of stock in the Estate Savings & Loan Association, and on January 17, 1942, her counterclaim in the interpleader action in which she sought similar relief. In her bill and counterclaim she also asked a finding that neither of the firms of attorneys had any lien upon her property for their services. These were the matters consolidated.

In these suits a decree was entered with the consent of all the parties financially interested, wherein the Dougladoice became the owner of properties said to be of the value of $25,000.00. The decree, however, reserved for further consideration the claim of these two firms of attorneys. Alternate evidence was taken upon the issues as to them. On December 14, 1942, a supplementary decree was entered adjudicating their rights. By paragraph 3 of that decree the court found as to the claim of Black & Beerman, they had proved the allegations of her pleadings by a preponderance of the evidence; that the writing on which the claimants relied as a contract between them was void for want of equity, and denied their claim to a lien. Black & Beerman relied wholly on the contract in writing with Mary executed on August 15, 1941. They made no plea on the quantum meruit basis.

The answer of Mary denies that any other defendant has any lien upon the property but admits that other defendant attorneys have performed certain legal services for which they may have some

claim for the amount thereof. Her answer to the bill also says that defendants other than Hayes "have performed certain legal services for which thay may have some claim for the amount thereof ***." In her complaint of January 30, 1942, she said: "that she understands ~~xxx~~ claim is made by said Black and Beermann for one-third of her said securities aforesaid, and said attorneys Byrne, Keeley and Grish also claim a like amount of one-third of her said securities by reason of some supposed services; that your said orator did consult said attorneys and may be indebted generally to said attorneys for a reasonable sum for what may have been done by them, the exact amount whereof is to your said orator unknown, but that your said orator did at no time authorize or understand that she was authorizing any assignment of her said certificates of stock herein or interest in property owned by her, and that she consulted said attorneys to recover for her a share and interest in the estate of said Stanley Daugelowicz as a result of her marriage to said Stanley Daugelowicz on or about July 5, 1941; and your orator prays that said attorneys may set forth the nature of their said claim and that your orator may be further advised in the premises, but denies that said attorneys have any right, title or interest in or to said certificates of stock and dividends aforesaid." In paragraph 23 of her said bill she says: "Your orator herwwith offers to do equity herein, to do and perform any act necessarily required of her according to equity and good conscience."

The claimants Black & Beermann say the decree as to them is manifestly against the evidence. The finding was that the contract was inequitable. On review of such decree the rule is that the findings of the chancellor, whonsees and hears the witneeses, is entitled to the same weight as the verdict of a jury and will not be set aside unless clearly and manifestly against the weight of the evidence. Elsasser v. Miller, 383 Ill. 243; Breen v. City of Chicago, 299 Ill. App. 614; Gorton v. Cummings, 49 N. E. (2nd) 645.

claim for the amount thereof. Per answer to the bill also says that defendants other than Dayed Shaw performed certain legal services for which they may have some claim for the amount thereof see." In her complaint of January 20, 1943, she said: "that the undersigned is now by said Blank and Bernstein for one-third of her said securities otherwise, and said attorneys Dayley and Grimm also claim a lien amount of the value of her said securities by reason of such rendered services; that your said trustee did consult said attorneys and may be indebted generally to said attorneys for a reasonable sum for what may have been done by them, the exact amount thereof is to your said orator unknown, but that your said orator did at the time authorize or ratify the that are was authorizing and assignment of her said certificates of stock herein or interest in property owned by her, and that the counsel said attorneys to recover for her a share and interest in the estate of said Stanley Dangerfield as a result of her marriage to said Stanley Dangerfield on or about July 5, 1941; and your orator prays that said attorneys may set forth the nature of their said claim and that your orator may be further advised in the premises, but denies that said attorneys have any right, title or interest in or to said certificates of stock and dividends aforesaid." In paragraph 22 of her said bill she says: "Your answer specific effect to do equity herein, to do and perform any and necessarily required of her according to equity and good conscience."

The plaintiffs place a premium on the course as to that is manifestly against the evidence. The finding was that the contract was invalidated. In review of such decree the rule is that the findings of the chancellor, who sees and hears the witnesses, is entitled to the same weight as the verdict of a jury and will not be set aside unless clearly and manifestly against the weight of the evidence. Flannery v. Collins, 386 Ill. 243; Gross v. City of Chicago, 382 Ill. App. 414; Norton v. Insurance, 62 N. E. (2d) 848.

The uncontradicted evidence here is to the effect that Mary was somewhat illiterate and her knowledge of the English language quite imperfect. This court has pointed out in another case that such a situation puts upon a member of the bar a duty toward a prospective client and to the community which he should not be slow to recognize. Berkos v. Aetna Life Ins. Co., 279 Ill. App. 243.

The evidence shows that the firm of Byrne, Kelley & Grish from the beginning of this litigation on July 23, 1941, when their written contract was made, to August 15, 1941, and even afterwards, until the employment of her present attorney, represented Mary. It is also undisputed that when the habeas corpus case was decided against her she became dissatisfied and began to consider employing some other attorney. She inquired of attorney James M. Burke, with a view to employing him. He replied that he specialized in criminal law and recommended Black & Beermann as attorneys skilled in probate law. On August 16, 1941, with a Lithuanian neighbor, Mrs. Bruno Zully, Mary went to the office of Burke. He telephoned to Mr. Black, who in a few minutes came to his office and then (Burke's office being filled with clients) at his suggestion Mary, Zully and Mr. Black retired to Black's office, which was in the same building. Later, Mr. Charles V. Chesnul, an attorney and office associate of Black & Beermann, skilled in the Lithuanian language, was called into consultation. There is hopeless conflict in the evidence as to what was said. There is no doubt about what was done. Before they parted Mary had signed a written contract drawn by Mr. Black, which employed Black & Beermann as her attorneys. With other things it says:

> "I, Mary Dowgialowicz, hereby for myself, my heirs, executors, administrators and assigns, agree to pay my said attorneys one-third (1/3rd) of any and all moneys, whether real, personal or mixed of every kind, nature and description that I may receive through my said late husband, or through him prior to his marriage, as well as any and all moneys, real estate and other property in my name at the time of the alleged incompetency of my said husband, which sums have been tied up by order of

The uncontradicted evidence here is to the effect that Mary was somewhat illiterate and had difficulty in reading language quite important. This Court has pointed out in another case that upon a distortion only less than a fraudulent one, a jury toward a prospective client and to the community which he should not be slow to recognize. Bishop v. Atlantic Life Ins. Co., 177 Ill. App. 524.

The evidence moved that at the time of signing, taking a copy from the beginning of this litigation to only [illegible], some thirty written contracts was made, to legal to, [illegible], the two attorneys, until the employment of the present attorney, represented by. It is also undisputed that when the lawyer counsel was called upon to draft the bonds signed by the bonds signed and began to consider employing some other attorney. The inquiry of attorney James E. Davis, with a view to employing him. It appears that he qualified in criminal law and recommended which a number of attorneys skilled in modern law. On August 18, 1942, with a [illegible] purpose, Mrs. Bruno called Mary back to his office to write. He dictated to Mr. Blom, who in a few minutes came to his office and [illegible] (Bruno's office being filled with clients) at his suggestion Mary, Emily and Mr. Blom retired to Blom's office, which was in the same building. Later, Mr. Charles V. Bonnard, an attorney and office associate of Blom & Bonnard, skilled in the Lithuanian language, was called into consultation. There is important conflict in the evidence as to what was said. There is no dispute about what was done. Before they parted Mary had signed a written contract drawn by Mr. Blom, which employed Blom & Bonnard as her attorneys. This other things it says:

> "I, Mary Kungilaites, hereby for myself, my heirs, executors, administrators and assigns, agree to pay by way of attorney one-third (1/3rd) of any and all bonds, whether real, personal or kind of every kind, nature and description that I may receive through my aid later included, or through his aid to bid settlers, as well as any and all money, real estate and other property in my name at the time of the alleged incompetency of my husband, which some have been filed up by order of

> the Probate Court of Cook County, hereby meaning and intending to pay one-third (1/3rd) of everything that has been released to me and involved in the conservatorship or in the deceased estate."

The testimony of Chesnul and Black tends to show that the provisions of the contract were translated and explained to Mary; that she was urged to take her time with reference to signing; that Black suggested she take it home with her and look it over and then come back and see him in regard to any provisions of which she might have doubt. Mary's testimony and that of Zully is to the effect that language was used tending to make Mary believe that her then attorneys had been disloyal to her; that she was even then so late it was not certain anything could be done for her, and that finally Mr. Black told her if she wished to employ him she would have to sign the contract right away, etc. This was on Friday. Mary says that Mr. Black told her to come back the next Monday and he would go to work on her case. She says she took the contract home; that it was read over to her in the Lithuanian language by a girl friend (also by Bruno Zully), and that on the following Monday she went with Zully to Black's office and told him he should correct the contract, that there was a mistake, that some of the property was her own money she had earned long ago, of which under this contract the firm would get one-third. She asked him to correct this. He said he would not do it, that he wouldn't amend the contract. She says she then left the contract with him and told him, "We don't want that you should take my case". Black denies this and claims that his firm, as a matter of fact, continued to act for Mary until September 11, 1941, when he received a letter from Attorney Cameron Latter informing him that Mary did not desire to employ them and that they would take the letter as a formal confirmation of her attitude in the matter.

The evidence indicates that later Black & Beermann manifested a proper spirit of cooperation. Mary repeatedly in her pleadings

the probate court of that county, hereby revoking and intending to pay one-half (1/2) of every thing that has been released to me yet involved in the aforementioned or in the aforesaid policy.

The testimony of General and Black proves to show that the provisions of the contract were translated and explained to Mary; that she was urged to take her time with reference to it; that Black suggested she take it home with him and look it over and then come back and let him be signed in any revisions of which she might have doubt. Mary's testimony was that at this is to the effect that Langsdorf was used tried to make Mary believe that her interests had been claimed to her; that she was even then as late it was not certain anything would be done for her, and that finally Mr. Black told her if she signed to accept the she would have to claim the contract right then, etc. This was on Friday. Mary says that Mr. Black told her to come back the next Monday and he would go to work on her case. She says the first the contract came; that it was read over to her in the attorney's lodging by a girl friend (also by Bruno Gallo), one that of the [illegible] Mary went with Gallo to Black's office and told him by mistake of the contract, that there was a mistake, that some of the company was her own money and several long sum, or which Mary thought contract the firm would get [illegible]. She asked him to correct this. He said he would not do it, that to correct would be contract. The says she then left the contract with and told him, he didn't want that you should take up cases. Black denies this and claims that his firm, as a matter of fact, persisted to get the Mary until September 12, 1941, when the receiver - letter from attorney Bruno Latter informing him that Mary did not desire to accept the and that they would take the letter as a formal cancellation of her activities in the matter.

The evidence indicates that Mr. Black's persuasion manifested a proper spirit of cooperation, that primarily in the direction

admits that she may be indebted to them in a just amount, and this admission is made as to both the firms of attorneys who served her. However, we regret neither firm offered specific evidence as to the value of their unpaid services. As to the claim of Black & Beerman this can make no difference. They relied solely upon their contract, which the trial court held to be unconscionable, and that they therefore could not recover upon it. As to that point the issue for this court is whether the finding of the trial court is clearly and manifestly against the weight of the evidence. The finding of the trial court in this regard had the same weight as the verdict of a jury. We cannot, under the rule, find it to be untrue, and this compels an affirmance of the decree in so far as Black & Beerman are concerned.

As to Byrne, Kelley & Grish, while no expert evidence was offered as to the value of their services unpaid, a majority of the court are of the opinion that there is sufficient evidence in the record to justify a finding by the trial court that the amount allowed to them (namely $2500) was reasonable and just. A majority of the court are, however, of the opinion that the matters put into their hands for attention did not constitute lienable claims within the meaning of the statute as construed in the case of Grossberg & Icely v. Knight, 266 Ill. App. 183. The writer of this opinion, while not questioning the general rule there stated, does not agree that the case is applicable and controlling under the facts of this case. It follows from what we have just said that the decree of the court as to the claim of Black & Beerman will be affirmed; that as to the claim of Byrne, Kelley & Grish the decree will be amended by striking the words giving them a lien for $2500 and affirming the judgment in their favor that for amount.

AFFIRMED IN PART; IN PART AMENDED,
AND AFFIRMED AS AMENDED.

O'Connor, P. J., and Nirmeyer, J., concur.

doubts that she may be indebted to them in a just amount, and this admission is made as to both the firms of attorneys who serve her. However, we regret neither firm offered specific evidence as to the value of their unpaid services. As to the claim of Black & Beerman this can make no difference. They relied solely upon their contract, which the trial court held to be unconscionable, and that they therefore could not recover upon it. As to that point the issue for this court is whether the finding of the trial court is clearly and manifestly against the weight of the evidence. The finding of the trial court in this regard had the same weight as the verdict of a jury. We cannot, under the rule, find it to be wrong, and this compels an affirmance of the decree in so far as Black & Beerman are concerned.

As to Stone, Kelly & Grish, while no expert evidence was offered as to the value of their services unpaid, a majority of the court are of the opinion that there is sufficient evidence in the record to justify a finding by the trial court that the amount allowed to them (namely $250) was reasonable and just. A majority of the court are, however, of the opinion that the matters put into their hands for attention did not constitute liensible claims within the meaning of the statute as construed in the case of Jacobsen & Lody v. Knight, 245 Ill. App. 160. The writer of this opinion, while not questioning the general rule there stated, does not agree that the case is applicable and controlling under the facts of this case. It follows from what we have just said that the decree of the court as to the claim of Black & Beerman will be affirmed; that as to the claim of Stone, Kelly & Grish the decree will be amended by striking the sums giving them a lien for $250 and affirming the judgment in their favor that far amount.

AFFIRMED IN PART; IN PART REVERSED,
AND AFFIRMED AS AMENDED.

O'Connor, P. J., and Hinshaw, J., concur.

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CHESTER P. WHITE,
Appellee,

v.

STENSON BREWING COMPANY, a corporation, and JOHN SCARMEAS,

Appeal of STENSON BREWING COMPANY, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

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322 I.A. 181

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries, brought by Chester P. White against John Scarmeas and the Stenson Brewing Company, a corporation, and upon trial by jury, at the close of all the evidence there was a directed verdict in favor of Scarmeas. The case as to the Stenson Brewing Company was submitted to the jury. There was a verdict of guilty with damages assessed at the sum of $3500, with judgment thereon, from which defendant appeals.

The complaint was filed June 27, 1941. It alleged Scarmeas conducted a tavern at 601 South Wells Street in Chicago and invited the public to use its facilities; that there was in the floor a trap door cover of an opening into the basement thereof; that the servant of the brewing company negligently left this trap door open and failed to protect and guard it, whereby plaintiff, while in the exercise of due care, fell through the hole in the floor into the basement and was injured. When the verdict for plaintiff against defendant was returned, defendant brewery moved for judgment notwithstanding the verdict and for a new trial. These motions were overruled and judgment entered on the verdict, from which this appeal has been perfected.

CHESTER F. WHITE,
Appellee,

v.

STEPHENSON BREWING COMPANY, a corporation,
and JOHN SCHMERGE,

Appellants.

Appeal of STEPHENSON BREWING COMPANY, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

3321A. 181

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries, brought by Chester F. White against John Schmerge and the Stephenson Brewing Company, a corporation, and upon trial by jury, at the close of all the evidence there was a directed verdict in favor of defendants. The case as to the Stephenson Brewing Company was submitted to the jury. There was a verdict of guilty with damages assessed at the sum of $5000, with judgment thereon, from which defendant appeals.

The complaint was filed June 27, 1921. It alleged defendants conducted a bar and at 301 South Halsted Street in Chicago and invited the public to use its facilities; that there was in the floor a trap door cover of an opening into the basement thereof; that the servant of the brewing company negligently left this trap door open and failed to protect and guard it, whereby plaintiff, while in the exercise of due care, fell through the hole in the floor into the basement and was injured. Over the verdict for plaintiff against defendant was returned, defendant brewery moved for judgment notwithstanding the verdict and for a new trial. These motions were overruled and judgment entered on the verdict, from which this appeal has been perfected.

It is contended that the plaintiff's injury was caused by his own negligence, or that at least he contributed thereto; that the court erred in refusing permission to defendant brewery to file certain pleas, interposing as a defense that the defendant corporation and the employer of plaintiff were both subject to the Workmen's Compensation Act, and that the action brought at common law would therefore not lie; that the amount of the damages allowed were excessive, etc.

The accident on account of which plaintiff sues occurred on the morning of May 13, 1941, in a tavern conducted by defendant Scarmeas at the southeast corner of Harrison and Wells Street in the City of Chicago. Harrison Street runs east and west, and Wells Street north and south. The main entrance to the tavern was at the southeast corner of Wells and Harrison Street. There was another entrance to the rear on Harrison Street, and to the east. A rough draft of the floor of the tavern is in evidence by agreement. It shows these entrances and that to the rear of the Wells-Harrison Street entrance running east and west there was a bar, and to the left and east of it a lunch counter. There were three lights in front of the bar and lunch counter and one light to the rear of the lunch counter. Back of the bar was another back bar, so-called, and to the rear of that a kitchen. Against the east wall of the room was a phone booth. Between the phone booth and the lunch counter was a trap door about four by four feet in size and leading to the basement of the building. To the right of the phone booth was a light and in the phone booth itself was a small light. Further to the rear and to the south were booths used by patrons and customers. There were also two other similar booths on the north or Harrison Street side of the tavern.

Plaintiff testified he entered the Harrison-Wells Street entrance of the tavern at about 10:30 A. M. on this particular morning

It is contended that the plaintiff's injury was caused by his own negligence, or that at least he contributed thereto; that the court erred in refusing permission to defendant brewery to file certain pleas, interposing as a defense that the defendant corporation and the employer of plaintiff were both subject to the workmen's Compensation Act, and that the action brought at common law would therefore not lie; that the amount of the damages allowed were excessive, etc.

The accident on account of which plaintiff sues occurred on the morning of May 13, 1941, in a tavern conducted by defendant Lorenzo at the southeast corner of Harrison and Wells Street in the City of Chicago. Harrison Street runs east and west, and Wells Street north and south. The main entrance to the tavern was at the southeast corner of Wells and Harrison Street. There was another entrance to the rear on Harrison Street, and to the east. A rough draft of the floor of the tavern is in evidence by agreement. It shows these entrances and that to the rear of the Wells-Harrison Street entrance running east and west there is a bar, and to the left and east of it a lunch counter. There were three lights in front of the bar and lunch counter and one light to the rear of the lunch counter. Back of the bar was another back bar, so-called, and to the rear of that a kitchen. Against the west wall of the room was a phone booth. Between the phone booth and the lunch counter was a trap door about four by four feet in size and leading to the basement of the building. To the right of the phone booth was a light and in the phone booth itself was a small light. Further to the rear and to the south were booths used by patrons and customers. There were also two other similar booths on the north of Harrison Street side of the tavern.

Plaintiff testified he entered the Harrison-Wells Street entrance of the tavern at about 10:30 a. m. on this particular morning

He was 63 years of age, was a salesman of cosmetics, soaps, etc. for the Princess Pat Company owned by Patricia Gordon. He worked on commission and had a drawing account of $40 per week. He says he entered the tavern for the purpose of phoning to a prospective customer. The bartender was one Edward Bertoncini. Plaintiff asked for a public telephone, handed a nickel to the bartender and received from him a slug. He had never been in the tavern before. He says that besides the bartender there were three or four other people there, one a woman. He asked where the phone was. The bartender said, "Back there", and made a motion toward the east. Plaintiff says he saw the small light in the phone booth. It was dark, however, in the east part of the building. He walked toward the light he saw in the booth, taking steps, he says, of about six inches at a time, and fell through the trap door, which was open, into the basement, without seeing the opening.

This door was used to deliver beer to the basement. Mr. Nahrstadt was the driver for the defendant brewing company and had been delivering beer to the tavern through this trap door to the basement for more than three years. On this particular morning Nahrstadt says the bartender told him they would take three barrels. He had opened the trap door according to the usual custom and barricaded it with chairs on three sides, then rolled in the barrels of beer. He then went to the basement to place the barrels there and while he was there plaintiff came through the trap door into the basement. That is the quite certain thing about the whole occurrence.

Plaintiff says it was very dark and that as he approached the trap door he could not see it. Four or five other witnesses say that the lights were on and that the trap door was barricaded, but apparently the jury believed the plaintiff rather than the four or five witnesses who testified to the contrary. If the testimony of these four or five witnesses was taken to be true, plaintiff would have been guilty of contributory negligence, as a matter of law,

He was 63 years of age, was a salesman of commodities, married, etc. for the principal last corporal owned by Patrick Gordon. He worked on commission and had a drawing account of $40 per week. He says he entered the tavern for the purpose of phoning to a prospective customer. The bartender was one Edward Beaumont. Plaintiff asked for a public telephone, handed a nickel to the bartender and received from him a slug. He had never been in the tavern before. He says that besides the bartender there were three or four other people there, one a woman. He asked where the phone was. The bartender said, "Back there", and made a motion toward the east. Plaintiff says he saw the small light in the phone booth. It was dark, however, in the east part of the building. He walked toward the light he saw in the booth, taking steps, he says, of about six inches at a time, and fell through the trap door, which was open, into the basement, without seeing the opening.

This door was used to deliver beer to the basement. Mr. Eberstadt was the driver for the defendant brewing company and had been delivering beer to the tavern through this trap door in the basement for more than three years. In this particular occasion Eberstadt says the bartender told him they would take some barrels. He had opened the trap door according to the usual custom and barricaded it with chairs on three sides, then rolled in the barrels of beer. He then went to the basement to close the barrels there and while he was there plaintiff came through the trap door into the basement. That is the quite certain thing about the whole occurrence.

Plaintiff says it was very dark and that as he approached the trap door he could not see it. Four or five other witnesses say that the lights were on and that the trap door was barricaded, but apparently the jury believed the plaintiff rather than the four or five witnesses who testified to the contrary. If the testimony of these four or five witnesses was taken to be true, plaintiff would have been guilty of contributory negligence, as matter of law,

as the defendant contends. But the testimony of the plaintiff was contrary to that of the other witnesses - the bartender, the beer driver, the lady who worked in the kitchen, and one or two other witnesses who were present. The defendant does not contend that the verdict is contrary to the weight of the evidence but asks us to hold, as a matter of law, that the plaintiff was guilty of contributory negligence which bars his recovery, citing as authorities Illinois Central R. R. Co. v. Oswald, 338 Ill. 270, 275; Pollard v. Broadway Central Hotel Corp., 269 Ill. App. 77, 81; Swanson v. Peter Schoenhofen Brewing Co., 215 Ill. App. 185. It may possibly be that the verdict of the jury on this point is contrary to the weight of the evidence, but defendant does not make that point, and we shall not, therefore, express any view on it. We are quite clearly of the opinion that in view of plaintiff's testimony we are not able to hold, as a matter of law, that plaintiff was guilty of contributory negligence which would bar her recovery.

We are more favorably impressed with the argument of defendant that the amount of damages allowed by the jury was excessive. The exact distance plaintiff fell does not appear from the evidence. He did not see a doctor until 2:30 in the afternoon on the day on which he fell. His medical expenses resulting from the injuries he received were $5.00 for an x-ray made and $8.00 for visits to a doctor, who advised the use of hot baths. The x-ray was made two months after the accident and disclosed a chip fracture of the olecranon process. Plaintiff testified that he felt some pain and was numb, but there is no proof of loss of time which reduced the wages he received.

A more serious question is raised by the contention of defendant that the court erred in denying a motion of the defendant for leave, after plaintiff rested, to file an additional plea setting up the Workmen's Compensation Act as a complete defense to the action. This motion was made after the defendant had moved the court for an

as the defendant contends. But the testimony of the plaintiff was contrary to that of the other witnesses - the bartender, the beer driver, the lady who worked in the kitchen, and one or two other witnesses who were present. The defendant has not contend that the verdict is contrary to the weight of the evidence but asks us to hold, as a matter of law, that the plaintiff was guilty of contributory negligence which bars his recovery, citing as authorities Illinois Central R. R. Co. v. Gerald, 238 Ill. 270, 275; Pollard v. Broadway Central Hotel Corp., 350 Ill. App. 77, 81; Duncan v. Peter Schoenhofen Brewing Co., 216 Ill. App. 168. It may possibly be that the verdict of the jury on this point is contrary to the weight of the evidence, but defendant does not make that point, and we shall not, therefore, express any view on it. We are quite clearly of the opinion that in view of plaintiff's testimony we are not able to hold, as a matter of law, that plaintiff was guilty of contributory negligence which would bar her recovery.

We are more favorably impressed with the argument of defendant that the amount of damages allowed by the jury was excessive. The exact distance plaintiff fell does not appear from the evidence. He did not see a doctor until 4:30 in the afternoon on the day on which he fell. His medical expenses resulting from the injuries he received were $5.00 for an x-ray made and $5.00 for visits to a doctor, who advised the use of hot packs. The x-ray was made two months after the accident and disclosed a slight fracture of the olecranon process. Plaintiff testifies that he felt some pain for two weeks, but there is no proof of loss of time which reduced the wages he received.

A more serious question is raised by the contention of defendant that the court erred in denying a motion of the defendant for leave, after plaintiff rested, to file an additional plea setting up the Workmen's Compensation Act as a complete defense to the action. This motion was made after the defendant had served the court for an

instructed verdict in its favor and the court had denied the motion. The motion was not supported by an affidavit showing diligence but defendant offered to testify (and the court evidently considered his offer, as true) that up to noon of the day he asked leave to file the plea he did not know plaintiff went into the tavern for any purpose connected with his employment; that he (the attorney) asked the employer if plaintiff was on her business at the time he was injured, and the employer said she did not know. It is apparent, as already stated, since the accident occurred on May 13, 1941, and the suit was one for personal injury, the Statute of Limitations would expire in two years. The complaint was filed June 27, 1941, and the defendant filed its answer July 21, 1941. Trial notice was given July 25, 1941. The case was called for trial on May 25, 1943, which was more than two years after the happening of the accident. The defendant, for the purpose of discovery, took the plaintiff's deposition on April 6, 1942.

It seems to be admitted by the parties that the question of leave to file this plea was one which called for the exercise of the sound judicial discretion of the trial judge. The law on this subject is stated in Illinois Revised Statutes, Chapter 7, Section 1, and Section 46 of the Civil Practice Act (Smith-Hurd's Anno. Stat., Chap. 110, par. 170 (1), (2) and (3).)

The statutory proceedings provided by the Workmen's Compensation Act in Illinois seems to provide the only remedy available to an injured employee, where both the employee and the employer are under the Act and the employee, at the time he receives his injury, is in the course of his employment. Section 13 of the Act vests in the Industrial Commission all the powers and duties which had been formerly given to the Industrial Board. Section 19, paragraphs (a), (b) and (e), prescribe the manner of procedure in the Commission and paragraph (f), (1) and (2), provides what court shall have jurisdiction to review decisions of the Commission, the powers to be

instructed verdict in its favor and the court had granted the motion. The motion was not supported by an affidavit showing diligence but defendant offered to testify (and the court evidently considered the offer, as true) that up to noon of the day he asked leave to file the plea he did not know plaintiff went into the tavern for any purpose connected with his employment; that he (the attorney) knew the employer if plaintiff was on her business at the time he was injured, and the employer said she did not know. It is apparent, as already stated, since the accident occurred on May 15, 1941, and the suit was one for personal injury, the statute of limitations would expire in two years. The complaint was filed June 7, 1941, and the defendant filed its answer July 21, 1941. Trial notice was given July 25, 1941. The case was called for trial on May 18, 1943, which was more than two years after the happening of the accident. The defendant, for the purpose of discovery, took the plaintiff's deposition on April 8, 1942.

It seems to be admitted by the parties that the question of leave to file this plea was one which called for the exercise of the sound judicial discretion of the trial judge. The law on this subject is stated in Illinois Revised Statutes, Chapter 7, section 1, and Section 45 of the Civil Practice Act (Smith-Hurd's Ann. Stat., Chap. 110, par. 170 (1), (2) and (3).)

The statutory proceedings provided by the Workmen's Compensation Act in Illinois seems to provide the only remedy available to an injured employee, where both the employer and the employer are under the act and the employee, at the time he receives his injury, is in the course of his employment. Section 12 of the act vests in the Industrial Commission all the powers and duties which had been formerly given to the industrial board. Section 19, paragraphs (a), (b) and (e), prescribe the manner of procedure in the Commission and paragraph (1), (1) and (2), provides that court shall have jurisdiction to review decisions of the Commission, the power to be

exercised by such court, the manner of procedure to reach the courts and the procedure in such courts. In Elles v. Industrial Commission, 375 Ill. 107, 113, the Supreme Court said:

> "Proceedings under this act are purely statutory and the circuit court can obtain jurisdiction to review such proceedings only in the method prescribed by the Act."

If we read this together with the sections of the Act above referred to, we seem to be compelled to the conclusion that the function of trying cases that are within the provisions of the Act is exclusively in the Commission and the right to review such trials is vested in circuit courts, city courts and the Superior Court of Cook County; that the jurisdiction of these courts on review is obtained through the writ of certiorari issued to the Commission, and that the proceedings of such courts must conform to that writ. Therefore, if the injured person and his employer are both under the Act, there can be no question as to where and how their respective rights and liabilities are to be determined.

Chapter 143, §6, Jones Ill. Stats., 1939, provides:

> "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act."

Section 29 covers any case where a third person, bound by the Act, is alleged to have caused the injury to any employee of another employer, who is also under the Act, and provides that the right of action of the injured employee shall be transferred to the injured employee's employer. This section was considered by the Supreme Court in O'Brien v. Chicago City Ry. Co., 305 Ill. 244, 255, where the court said:

> "The common law right of action of an employee against any other person than his employer for negligently injuring him in the course of his

exercised by such court, the manner or procedure to reach the courts and the procedure in such courts. In Illes v. Industrial Commission, 275 Ill. 107, 112, the supreme court said:

> "Proceedings under this act are purely statutory and the circuit court can obtain jurisdiction to review such proceedings only in the method prescribed by the Act."

If we read this together with the sections of the act above referred to, we seem to be compelled to the conclusion that the function of trying cases that are within the provisions of the Act is exclusively in the Commission and the right to review such trials is vested in circuit courts, city courts and the superior Court of Cook County; that the jurisdiction of these courts on review is obtained through the writ of certiorari issued to the Commission, and that the proceedings of such courts must conform to that writ. Therefore, if the injured person and his employer are both under the Act, there can be no question as to where and how their respective rights and liabilities are to be determined.

Chapter 142, §6, Jones Ill. Stats., 1928, provides:

> "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act."

Section 29 covers any case where a third person, bound by the Act, is alleged to have caused the injury to any employee of another employer, who is also under the Act, and provides that the right of action of the injured employee shall be transferred to the injured employee's employer. This section was considered by the Supreme Court in O'Brien v. Chicago City Ry. Co., 308 Ill. 244, 255, where the court said:

> "The common law right of action of an employee against any other person than his employer for negligently injuring him in the course of his

> employment where such other person is bound by the provisions of the Workmen's Compensation Act is abolished."

See also the later cases of Thornton v. Herman, 380 Ill. 341, and Taylor v. Boston Store, (abst.) 321 Ill. App. 301.

It would seem, the law being as stated in these cases, if the pleas offered by defendant were true, the supposed cause of action upon which plaintiff sued never existed. If the employer of plaintiff and the defendant were both under the Workmen's Compensation Act, then the only question the Superior Court could determine was whether plaintiff, at the time he received his injury, was in the course of his employment. The certificates offered with the pleas tended to show that both employers were under the Act at the time of the accident. The evidence of plaintiff finally tended to show that he was at the time he received his injury in the course of his employment. Defendant then asked leave to file his plea. If the matter set up in the plea was not in fact true, plaintiff would have had the right to raise the issue by a reply thereto. Even prior to the enactment of the Civil Practice Act the courts of this state were not slow to allow filing of pleas in the interest of justice. The practice in that regard is well illustrated by the cases of Clark v. Wisconsin Central Ry. Co., 261 Ill. 407, 411-12, and Carlson v. Johnson, 263 Ill. 556, 562-63.

For the error in denying leave to file this plea the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Niemeyer, J., concurs.
O'Connor, P. J., dissents.

> employment where such other person is bound by the provisions of the workmen's Compensation Act is abolished."

See also the later cases of Thornton v. Herman, 180 Ill. 341, and Taylor v. Boston store, (abst.) 201 Ill. App. 201.

It would seem, the law being as stated in these cases, if the pleas offered by defendant were true, the supposed cause of action upon which plaintiff sued never existed. If the employers of plaintiff and the defendant were both under the workmen's Compensation Act, then the only question the superior Court could determine was whether plaintiff, at the time he received his injury, was in the course of his employment. The certificates offered with the pleas tended to show that both employers were under the act at the time of the accident. The evidence of plaintiff itself tended to show that he was at the time he received his injury in the course of his employment. Defendant then asked leave to file his plea. If the matter xxxx set up in the plea was not in fact true, plaintiff would have had the right to traverse the issue by a reply thereto. Even prior to the enactment of the civil practice act the courts of this state were not slow to allow filing of pleas in the interest of justice. The practice in that respect is well illustrated by the cases of Clark v. Illinois Central R. Co., 231 Ill. 427, 431-32, and Carlson v. Johnson, 220 Ill. 524, 526-27.

For the error in denying leave to file this plea the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Mierayer, J., concurs.
O'Connor, P. J., dissents.

42891

THE NATIONAL SUPPLY COMPANY-MIDWEST,
a corporation,
Appellant,

v.

JAY E. BURNS,
Appellee.

Appeal from
Circuit Court,
Cook County.

374
91
4

322 I.A. 181

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action tried by the court on April 24, 1943, there was a finding for defendant with judgment thereon, from which plaintiff appeals.

The original suit was filed March 4, 1930, as an action in debt, based on an alleged judgment recovered by plaintiff against defendant on April 12, 1929, in the District Court of the State of Wyoming. Defendant was served and filed a plea denying the validity of the Wyoming judgment for lack of jurisdiction in the Wyoming court. November 27, 1941, the common law pleadings were abandoned and plaintiff filed an amended complaint under the Civil Practice Act. This complaint was based on the original transaction said to have been for goods sold and delivered by plaintiff to defendant and an account thereon said to have been stated on April 12, 1929, for a balance due of $1,848.96, with interest. The answer of defendant set up that the cause of action set up in the amended complaint was a different cause of action from that stated in the original declaration and that the claim alleged to be due was barred by the Statute of Limitations of this state. Plaintiff made a motion for a summary judgment. The pleadings were all verified, and defendant filed affidavits in opposition.

42891

THE NATIONAL SUPPLY COMPANY-MIDWEST,
a corporation,

Appellant,

v.

JAY E. BURNS,

Appellee.

Appeal from
Circuit Court,
Cook County.

32321.A.181

MR. JUSTICE SATCHELL DELIVERED THE OPINION OF THE COURT.

In an action tried by the court on April 24, 1942, there was a finding for defendant with judgment thereon, from which plaintiff appeals.

The original suit was filed March 4, 1930, as an action in debt, based on an alleged judgment recovered by plaintiff against defendant on April 12, 1929, in the District Court of the State of Wyoming. Defendant was served and filed a plea denying the validity of the Wyoming judgment for lack of jurisdiction in the Wyoming court. November 7, 1941, the common law pleadings were abandoned and plaintiff filed an amended complaint under the Civil Practice Act. This complaint was based on the original transaction said to have been for goods sold and delivered by plaintiff to defendant and an account thereon said to have been stated on April 12, 1929, for a balance due of $1,240.38, with interest. The answer of defendant set up that the cause of action set up in the amended complaint was a different cause of action from that stated in the original declaration and that the claim alleged to be due was barred by the statute of limitations of this state. Plaintiff made a motion for a summary judgment. The pleadings were all verified, and defendant filed affidavits in opposition.

November 20, 1942, an order was entered granting leave to defendant to file an additional answer to the amended declaration. The answer was filed November 23, 1942, and set up that the cause of action stated in the amended complaint did not accrue to plaintiff at any time within ten years before the filing of its amended complaint; that the cause of action set up in the amended complaint was different from that alleged in the original complaint, and that the cause was barred by the Statute of Limitations. November 23, 1942, the court entered a finding that the issue raised by the defendant's pleading of the Statute of Limitations was one of fact and should be tried by a jury and that this was the only issue remaining to be tried. The motion for summary judgment was therefore overruled. The court then heard the evidence with the result as above stated.

Plaintiff's theory is first that the suit is based on a writing within the meaning of Section 16, Chapter 83 of the Illinois Revised Statutes, which provides a ten year limitation for action brought on bonds, promissory notes, bills of exchange, written leases, written contracts, "or other evidences of indebtedness in writing". Plaintiff's theory is that since there were letters from defendant acknowledging the justness of the account, its action was based upon such a writing, and that the ten-year statute was applicable. In that connection plaintiff also contends defendant was absent from the State of Illinois for four and one-half years after the commencement of the action and that under section 18 of the limitations act the statute would notrun during the time of his absence from the state and the action, therefore, is not barred on its face as it otherwise would be. Plaintiff further contends (citing Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222,228) that at any rate the amended statement of claim relates back to the date of the filing of the suit and for that reason, also, the claim is not barred.

Close questions often arise as to whether a given suit is

November 10, 1949, an order was entered granting leave to amendment to file an additional answer to the amended declaration. The answer was filed November 16, 1949, and set up that the cause of action stated in the amended complaint did not accrue to plaintiff at any time within ten years before the filing of the amended complaint; that the cause of action set up in the amended complaint was different from that alleged in the original complaint, and that the cause was barred by the statute of limitations. November 30, 1949, the court entered a finding that the issue raised by the defendants's plea of the statute of limitations was one of fact and should be tried by a jury and that this was the only issue pending to be tried. The motion for summary judgment was therefore overruled. The court then heard the evidence with the result as above stated.

Plaintiff's theory is first that the suit is based on a written within the meaning of section 16, Chapter 83 of the Illinois Revised Statutes, which provides a ten year limitation for action brought on bonds, promissory notes, bills of exchange, written leases, written contracts, "or other evidences of indebtedness in writing". Plaintiff's theory is that since there was laches from defendant acknowledging the justness of the account, the action was based upon such a writing, and that the ten-year statute was applicable. In that connection plaintiff also contends defendant was absent from the state of Illinois for four and one-half years after the accrual of the action and that under section 18 of the limitations act the statute would not run during the time of his absence from the state and the action, therefore, is not barred on its face as it otherwise would be. Plaintiff further contends (citing Pennsylvania Trust Co. v. Kansas City Co., 300 Ill. 229,229) that at any rate the amended statement of claim relates back to the date of the filing of the suit and for that reason, also, the claim is not barred.

Close questions often arise as to whether a given suit is

based on a written contract within the meaning of the section of the statute relied on. The general rule seems to be that written admissions merely are not sufficient; that where oral evidence is necessary in order to prove the contract on which the suit is based, the suit itself is regarded as based upon an oral and not a written contract. This will appear from an examination of Woods v. Williams, 142 Ill. 269; Knight v. St. Louis, Iron Mountain & Southern Ry. Co., 141 Ill. 110, and Bates v. Bates Machine Co., 230 Ill. 619. That there are cases close upon this point will be noticed by a comparison of these with Ruettinger v. Schulman, 293 Ill. App. 285, and Grossfeld & Roe Co. v. Zuckerman, 192 Ill. App. 90. We are disposed to hold, in view of all the evidence, that the amended complaint was based on an oral rather than a written contract, but that it is unnecessary to decide that question here.

In the last analysis the case turns on the issue of fact as to whether the contention of plaintiff that four and one-half years after the accrual of the action should be deducted in fixing the time of limitation of the action under the statute, because of defendant's absence from the state. There was much evidence taken on that point. The court found for the defendant, and it is not argued that the finding is against the weight of the evidence.

The only contention left is whether the cause of action set up in the amended complaint relates back to the original declaration filed March 4, 1930, by reason of Section 46 of the Civil Practice Act. Plaintiff says it does, relying on Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222, construing Section 46. As already stated, the original action here was an action in debt, filed March 4, 1930, based on an alleged judgment recovered April 12, 1929, in the State of Wyoming. The Bowman case makes the identity of the action itself depend on whether the amended complaint is based on the same "action or occurrence". During the trial here plaintiff

based on a written contract which the meaning of the written of the statute relied on. The general rule seems to be that written statements merely are not sufficient; but some oral evidence is necessary in order to prove the contract to which the suit is based, the suit itself is regarded as based upon an oral and not a written contract. This will appear from an examination of cases v. Williams, 140 111. 268; Pickett v. St. Louis, Iron Mountain & Southern Ry. Co., 148 111. 118, and Ryan v. Young Machine Co., 200 111. 218. That there are cases which seem to give this point will be noticed by a consideration of these cases Westfall v. Ashland, 200 111. 499, 508, and Greenfield & Ry. Co. v. Bunnell, 182 111. 499, 505. We are disposed to hold, in view of all the evidence, that the amended complaint was based on an oral rather than a written contract, but that it is unnecessary to decide that question here.

In the light analyzing the new turns on the issue of fact as to whether the commencement of plaintiff's suit four and one-half years after the accrual of the action could be indulged in without the time of limitation of the action under the statute, because of defendant's absence from the state. There was much evidence taken on that point. The court found for the defendant, and it is not argued that the finding is against the weight of the evidence.

The only contention left is whether the mere of action was in the amended complaint relates back to the original declaration filed March 1, 1900, by reason of section 14 of the civil practice act. Plaintiff says it does, relying on Gatewright Coal Co. v. Duncan Coal Co., 200 111. 124, construing section 14. As already stated, the original action here was in action in tort, filed March 1, 1900, based on an alleged judgment recovered April 11, 1898, in the state of Illinois. The Duncan case holds the identity of the action lies not in whether the amended pleading is based on the same "action or cause" during the total date plaintiff

withdrew its claim based on the Wyoming judgment. The original complaint was not only withdrawn but was in its nature and quality quite distinct from the nature and quality of the demands set up in the amended complaint. The difference between an action for debt and one for goods sold and delivered on stated account are deep and fundamental in their nature. The amended complaint did not relate back.

The judgment will be affirmed.

AFFIRMED.

O'Connor P. J., and Niemeyer, J., concur.

withdrew its claim based on the wrong in court. The original complaint was not only withdrawn but was in its nature and quality quite distinct from the nature and quality of the demands set up in the amended complaint. The difference between an action for debt and one for goods sold and delivered on stated accounts are deep and fundamental in their nature. The amended complaint did not relate back.

The judgment will be affirmed.

AFFIRMED.

O'Connor P.J., and Niemeyer, J., concur.

42896

ARTHUR L. WHITELY,
Appellee,

v.

ARLINGTON FARMS, INCORPORATED,
a corporation,
Appellant.

322 I.A. 182

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

375 A 2

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of $5,100 entered against it on plaintiff's claim for commissions as a real estate broker in the sale of defendant's farm and equipment to the Curtiss Candy Company.

The undisputed evidence shows that defendant inserted an advertisement in the Sunday-March 15, 1942 issue of the Chicago Tribune for the sale of the farm; plaintiff got in touch with Leonard M. Bernard, an officer of the defendant representing it in the transaction, introduced himself as a real estate broker and stated that he had a good many prpspects to whom he would like to submit the property; plaintiff was given several pictures; he attempted to sell the farm to a Mr.MacDonald; about the middle of June, Bernard advised plaintiff that he did not think MacDonald was in a financial condition to carry through the transaction, and said to plaintiff, "Why don't you get ahold of a man like Mr. Schnering of Curtiss Candy Company, who has money to buy the place." On June 18 plaintiff wrote Schnering at his place of business, giving information concerning the farm, its location, buildings and equipment, and offering it equipped for $150,000, or, the land and buildings for $90,000; he also stated that he would call on Schnering some evening and show him some pictures of the place; this letter was received by Schnering not later than June 22, 1942; on that day Schnering communicated with Bernard and made an appointment to examine the

32 L.A. 122

Herman L. Wright,

Appellee,

v.

Quality Food, Incorporated,
a corporation,

Appellant.

Appeal from Superior Court,
Hon. Joseph Kennedy, Judge.

Affirmed.

Defendant corporation from a judgment of $3,500 entered against it on plaintiff's claim for commissions as a real estate broker in the sale of defendant's farm and equipment to the Quality Food Company.

The undisputed evidence shows that defendant inserted in advertisement in the Sunday-Herald is, 1922 issue of the Quality Food Company, plaintiff was given exclusive authority to sell the farm to a Mr. McDonald; about the middle of June, defendant informed plaintiff that he did not think McDonald was in a financial condition to carry through the transaction, and said to plaintiff, "Why don't you get hold of a man like Mr. Johnston of Quality Food Company, who has money to buy the place." In June 24 plaintiff wrote Johnston at his place of business, giving information concerning the farm, its location, buildings and equipment, and stating it equipped for $140,000, or, the land and buildings for $90,000; he also stated that he would call on Johnston some evening and show him some pictures of the place; this letter was followed by telephone and later from Johnston, and on this day conferring communicated with Johnston and made an appointment to meet him

property the following day at 3 o'clock in the afternoon; Schnering examined the property and had several conversations with Bernard at the farm and in the latter's office; on July 5, 1942 a contract dated July 3 was signed for the sale of the farm to the Curtiss Candy Company for $102,000 - $52,000 of which was to be paid in cash and the remaining $50,000 represented by a 10 year mortgage; the deed to the Curtiss Candy Company, dated August 7, was recorded August 18, 1942. After writing the letter of June 18, plaintiff saw Schnering at his home on two occasions, and on July 3 telephoned and offered to drive him to the farm; this offer was rejected. Plaintiff had no further conversations or communications with Schnering. On July 7 Bernard told plaintiff that he thought Schnering's idea was to deal direct with Bernard and pay the broker as little as possible. Plaintiff had no conversation with Bernard after that. Plaintiff was never with Schnering at the farm or present at any of the negotiations or transactions between Schnering and Bernard. Plaintiff did not learn of the closing of the deal until August 9, when told by the herdsman on the farm.

Evidence on behalf of the plaintiff tends to show that when Bernard suggested that plaintiff get hold of a man like Schnering, plaintiff said, "If a deal is made with Schnering I will get full commission, is that right?" - and that Bernard said "O. K.," and gave plaintiff further details about the farm; that plaintiff first saw Schnering at his home on the evening of June 20 when Schnering admitted receiving plaintiff's letter and was shown the pictures of the farm; that plaintiff again saw Schnering at his home on June 26, at the suggestion of Bernard, when, at Schnering's request, plaintiff promised to try to get the farm at a lower price, but didn't carry out the promise; that plaintiff saw Charles Bernard, a brother of Leonard, at the farm about July 12 - which was after the contract to sell had been signed - and was told that Charles didn't think Schnering had enough money to pay down, and that

property the following day at 1 o'clock in the afternoon; subsequently examined the property and had several conversations with Donald at the farm and in the Jackson's office; on July 8, 1942 - contract dated July 2 was signed for the sale of the farm to the defendant Donald Jackson for $10,000 - $9,000 of which was to be paid in cash and the remaining $1,000 represented by a 10 year mortgage; the deed to the Jackson Land Company, dated August 7, was recorded August 14, 1942. After writing the letter of June 16, plaintiff was commuting at his home on the weekends, and on July 4 telephoned and offered to drive him to the farm; this offer was rejected. Plaintiff had no further conversations or communications with defendants. On July 7 defendant told plaintiff that he thought defendant's idea was to deal direct with Edward and cut the broker as little as possible. Plaintiff had no conversation with defendant after that. Plaintiff was never with defendant at the farm or present at any of the negotiations or transactions between defendant and Edward. Plaintiff did not learn of the closing of the deal until August 9, when told by the defendant on the farm.

Evidence on behalf of the plaintiff tends to show that when defendant suggested that plaintiff get hold of a man like Edward, plaintiff said, "If a deal is made with Edward I will get full commission, is that right?" and that defendant said "Yes, I will pay plaintiff further details about the farm; that plaintiff could see defendant at his home on the evening of June 16 when defendant mentioned meeting plaintiff's father and he asked the plaintiff of the farm; that plaintiff again saw defendant at his home on June 18, at the suggestion of defendant, when, at defendant's request, plaintiff promised to try to get the farm at a lower price, but didn't worry out the problem; that plaintiff was thinking between a broker of Edward, at the time about July 1 - which the trial judge emphasized as well has been alleged - but not that defendant's talks indicating had enough money to pay him, but that

plaintiff then said that he would try to get Schnering to pay more cash, but didn't do so. Schnering and Charles Bernard, respectively, denied the latter conversations with plaintiff and plaintiff's promises to get a better price from Bernard or to get Schnering to pay more money.

Evidence on behalf of the defendant tends to prove that along in May 1942, Titus, who had a real estate broker's license and was employed in the management of farms owned by Ozman, a friend of Bernard's, informed Ozman that Schnering was in the market for a farm similar to that offered for sale by defendant; that Ozman had met Bowles, one of the original partners in the Curtiss Candy Company, in Florida the preceding winter and that after his talk with Titus, Ozman communicated the information to Bernard and also talked with Bowles about Schnering with respect to defendant's farm along in May; that on the night of June 20, when plaintiff claims to have first visited Schnering at his home, Bowles and his wife were guests at Schnering's home, and Bowles then told Schnering about defendant's farm; that plaintiff's visit to Schnering's home was just before receipt of plaintiff's letter; that on this visit Schnering informed plaintiff that he had previously heard about the farm and didn't need plaintiff's services. Bowles did not testify, it appearing that for some time he had been confined to his home, suffering from coronary thrombosis and under doctor's orders to keep "very, very quiet." On Monday, June 22, as heretofore stated, Schnering got in touch with Bernard and made an appointment to visit the farm on the following day at 3 p. m. Plaintiff's original type written le ter to Schnering was produced by the latter and received in evidence; it bears a notation in ink "Uni 2127," which the parties claim is an abbreviation of "University 2127" - Bernard's telephone number; it also bears the notation "3 PM." Upon the evidence the jury found for the plaintiff, and the court entered judgment on the verdict. There is no complaint about the instructions.

plaintiff then said that he would try to get someone to see more cars, but didn't do so. Corresponding and delivering, respectively, denied the latter conversations with plaintiff and plaintiff's promise to get a better price from Bernard or to get something to pay more money.

Witness on behalf of the defendant testified that Joe, in May 1963, Miss, who had a real estate broker's license and was employed in the management of Bonny Street by Jones, a friend of Bernard's, informed Owens that someone was in the market for a farm similar to that offered for sale by defendant; that Owens had met Jones, one of the original partners in the Curtiss Camp Meeting in Florida the preceding winter and that after his talk with Jones, Owens communicated the information to Bernard and also talked with Jones about bringing with respect to defendant's farm along in May; that on the night of June 20, when plaintiff claims to have first visited Bernard at his home, Jones and his wife were guests at Bernard's home, and Jones then said something about defendant's farm; that plaintiff's visit to Bernard's home was just before receipt of plaintiff's letter; that on this visit Bernard informed plaintiff that he had previously heard about the farm and that plaintiff's property. Jones did not testify, in rebuttal that for some time he had been confined to his home, suffering from pneumonia. Bernard and Miss Bauter's desire to keep "it", very quiet. On Monday, June 24, at Bernstorff's office, following yet in which Bernard and Miss Bauter had agreed to visit the farm on the following day at 2 p. m. Plaintiff's original type written letter to Bernstorff was produced by the latter and received in evidence; it bears a notation in red ink "Bernard", which the parties claim is an abbreviation of "Bernstorff Bill" - Bernard's nickname; it also bears the notation "6 ins." Upon the evidence the jury found for the plaintiff, and the court entered judgment on the verdict. There is no complaint about the instructions.

Defendant contends that during the arguments on its motion for judgment notwithstanding the verdict, or in the alternative for a new trial, the trial court expressed its opinion that the verdict was manifestly against the weight of the evidence and did not support the judgment. Notwithstanding defendant's construction of the statements of the court, the respective motions were denied, and we are governed by what the court did rather than what it said. Upon an examination of the record we think the question presented was a question for the jury and we cannot say that its finding is manifestly against the weight of the evidence.

Defendant argues that as a matter of law the plaintiff has not shown that he was the procuring cause in the sale of the farm to the Curtiss Candy Company. The law applicable to the facts before us is stated in Rigdon v. More, 226 Ill. 382, and Hafner v. Herron, 165 Ill. 242, cited by both of the parties. If the jury believed plaintiff's statement that Bernard promised to pay him full commissions if a sale was made to Schnering, the case is brought directly within Baker v. Murphy, 105 Ill. App. 151, cited by plaintiff. If the jury disbelieved the testimony on behalf of the defendant tending to show that Bowles had first brought defendant's farm to the attention of Schnering, then we have a case in which the real estate broker, at the suggestion of the owner of the property, has brought the property to the attention of a prospective buyer. The broker would then be entitled to commissions, even though owner and purchaser, after the broker had submitted the property, elected to deal together and to the exclusion of the broker.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

Defendant contends that during the argument on its motion for judgment notwithstanding the verdict, or in the alternative for a new trial, the trial court expressed its opinion that the verdict was manifestly against the weight of the evidence and did not support the judgment. Notwithstanding defendant's construction of the statements of the court, the respective motions were denied, and we are governed by what the court did rather than what it said. Upon an examination of the record we think the question presented was a question for the jury and we cannot say that its finding is manifestly against the weight of the evidence.

Defendant argues that as a matter of law the plaintiff has not shown that he was the procuring cause in the sale of the farm to the Curtiss Candy Company. The law applicable to the facts before us is stated in Rigdon v. More, 226 Ill. 382, and Hafner v. Herron, 186 Ill. 242, cited by both of the parties. If the jury believed plaintiff's statement that Bernard promised to pay his full commissions if a sale was made to Sommering, the case is brought directly within Baker v. Murphy, 108 Ill. App. 181, cited by plaintiff. If the jury disbelieved the testimony on behalf of the defendant tending to show that Dowlea had first brought defendant's farm to the attention of Sommering, then we have a case in which the real estate broker, at the suggestion of the owner of the property, has brought the property to the attention of a prospective buyer. The broker would then be entitled to commissions, even though owner and purchaser, after the broker had submitted the property, elected to deal together and to the exclusion of the broker.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

Abstract

322 Ill. App. 3
5-15-44

Gen. No. 9914. Agenda No. 13.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

322 I.A. 277

OCTOBER TERM, A. D. 1943.

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| ELIAS H. TRUMBO, Administrator of the Estate of Jeannette Trumbo, deceased; HARRY HAROLD, Administrator of the Estate of Dale Harry Harold, deceased; JASON MILLS, Administrator of the Estate of Eathel Mills, deceased; and FLOSSIE CHARLESON, Administratrix of the Estate of Warren Ellis Taplin, deceased, Plaintiffs-Appellees, vs. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation, Defendant-Appellant. | Appeal from Circuit Court, La Salle County. |

WOLFE,-- J.

The Village of Leland is located in the Northern part of LaSalle County. The Chicago, Burlington and Quincy Railroad Company was possessed of, and operated a double track railroad extending through LaSalle County in an easterly and westerly direction and passed through the Village of Leland. A short distance south of the railroad tracks is the United

Abstract

Gen. No. 9214. Grade No. 12.

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1923.

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| ELIAS N. TUCKER, Administrator of the Estate of Jeannette Irwin, deceased; HARRY HAROLD, Administrator of the Estate of Dale Harry Harold, deceased; JASON MILLS, Administrator of the Estate of Daniel Mills, deceased; and FRANK GUARLSON, Administratrix of the Estate of Warren Ella Traylor, deceased, Plaintiffs-Appellees, vs. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation, Defendant-Appellant. | Appeal from Circuit Court, La Salle County. |

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WOLFE, -- J.

The village of Leland is located in the northern part of Lasalle County. The Chicago, Burlington and Quincy Railroad Company was possessed of, and operated a double track railroad extending through Lasalle County in an easterly and westerly direction and passed through the village of Leland. A short distance north of the railroad tracks is the United

States Highway No. 34. The principal street in the Village of Leland is Main Street, which connects with the United States Highway No. 34. Main Street crosses the railroad tracks of the Chicago, Burlington and Quincy Railroad. There are two main tracks, one for the eastbound traffic and one for the westbound traffic and two switch tracks where Main Street crosses the railroad. On November 10, 1941, Jeannette Trumbo, Dale Harry Harold, Eathel Mills and Warren Ellis Taplin had been visiting in the home of Mrs. Ekdahl who lived approximately two blocks northwest of the railroad crossing in the Village of Leland. They left the home of Mrs. Ekdahl at about 2:00 o'clock in the morning. They were riding in an automobile and as they were crossing the railroad track at Main Street, a freight train of the defendant was being driven in an easterly direction at the rate of 50 miles per hour, and collided with the motor car and the occupants of the car were killed.

Elias H. Trumbo, Administrator of the Estate of Jeannette Trumbo, deceased, started a suit in the Circuit Court of LaSalle County for damages sustained by reason of the death of plaintiff's intestate.

It is charged in the complaint that the crossing in question, was dangerous and hazardous; that there were buildings along the north side of the track which obstructed the view of parties crossing from the north; that on account of

States Highway No. 34. The principal street in the village of Leland is Main Street, which connects with the United States Highway No. 34. Main Street crosses the railroad tracks of the Chicago, Burlington and Quincy Railroad. There are two main tracks, one for the eastbound traffic and one for the westbound traffic and two switch tracks where Main Street crosses the railroad. On November 10, 1941, Jeannette Trumbo, Dale Harry Harold, Rachel Mills and Warren Mills Teglin had been visiting in the home of Mrs. Eudahl who lived approximately two blocks northwest of the railroad crossing in the village of Leland. They left the home of Mrs. Eudahl at about 8:00 o'clock in the evening. They were riding in an automobile and as they were crossing the railroad track at Main Street, a freight train of the defendant was being driven in an eastbourd direction at the rate of 30 miles per hour, and collided with the motor car and the occupants of the car were killed.

Elias H. Trumbo, administrator of the estate of Jeannette Trumbo, deceased, started a suit in the Circuit Court of LaSalle County for damages sustained by reason of the death of plaintiff's intestate.

It is charged in the complaint that the crossing in question, was dangerous and hazardous; that there were buildings along the north side of the track which obstructed the view of parties crossing from the north; that on account of

the dangerous and hazardous nature of said crossing, the railroad company maintained gates at the crossing and operated them from 5:10 a.m. until 10:30 p.m.

"That at that time it was the duty of the defendant to operate the gates at said crossing or maintain a watchman, or install, maintain and operate an adequate signal device to give warning of the approach of trains at all times, both day and night, to persons lawfully travelling upon said street and approaching and crossing said tracks and to exercise reasonable care in the operation of its locomotives and trains of cars as they approached said street crossing so as not to injure or kill persons lawfully upon said street and approaching and crossing over said tracks.

"The complaint further alleges that the defendant, in the night time, at about the hour of 2:15 o'clock A.M. on said day, by and through its employees, servants and agents, drove and operated a locomotive engine with a train of freight cars in an easterly direction upon said railroad and over and across the intersection thereof with said Main Street in said Village of Leland;

"That plaintiff's intestate was then and there riding as a passenger and guest in a southerly direction in a certain automobile on said Main Street in said Village of Leland and crossing said tracks of the defendant at the intersection thereof with Main Street.

"That the locomotive engine of the defendant then and there ran into and struck the automobile in which plaintiff's

the dangerous and hazardous nature of said crossing, the railroad company maintained gates at the crossing and operated them from 5:10 a.m. until 10:30 p.m.

"That at that time it was the duty of the defendant to operate the gates at said crossing or maintain a watchman, or install, maintain and operate an adequate signal device to give warning of the approach of trains at all times, both day and night, to persons lawfully travelling upon said street and approaching and crossing said tracks and to exercise reasonable care in the operation of the locomotives and trains of cars as they approached said street crossing so as not to injure or kill persons lawfully upon said street and approaching and crossing over said tracks.

"The complaint further alleges that the defendant, in the night time, at about the hour of 9:15 o'clock p.m. on said day, by and through its employees, servants and agents, drove and operated a locomotive engine with a train of freight cars in an easterly direction upon said railroad and over and across the intersection thereof with said Main Street in said Village of Leland.

"That plaintiff's intestate was then and there riding as a passenger and guest in a southerly direction in a certain automobile on said Main Street in said Village of Leland and crossing said tracks of the defendant at the intersection thereof with Main Street.

"That the locomotive engine of the defendant then and there ran into and struck the automobile in which plaintiff's

intestate was riding, as aforesaid, with great force and violence, and plaintiff's intestate was then and there struck with great force and violence and killed.

"That at the times herein mentioned plaintiff's intestate was in the exercise of due care and caution for her own safety.

"That the death of plaintiff's intestate was caused by one or more of the following acts of negligence on the part of the defendant prior to and at the time of the death of plaintiff's intestate, as aforesaid.

"(a) The defendant carelessly and negligently failed and neglected to operate the gates at said crossing.

"(b) The defendant carelessly and negligently failed to maintain a watchman at said crossing to give warning of the approach of trains.

"(c) The defendant carelessly and negligently failed to maintain and operate a signal device at said crossing to give warning of the approach of trains.

"(d) The defendant so carelessly and negligently operated and managed said locomotive and train of cars that it ran into and against the automobile in which plaintiff's intestate was riding and caused her death.

"(e) The defendant carelessly and negligently operated said locomotive in that no bell of at least thirty pounds weight or steam whistle on said locomotive were rung or whistled by the engineer or fireman at a distance of at least eighty rods from

intestate was riding, as aforesaid, with great force and violence, and plaintiff's intestate was then and there struck with great force and violence and killed.

"That at the time herein mentioned plaintiff's intestate was in the exercise of due care and caution for her own safety.

"That the death of plaintiff's intestate was caused by one or more of the following acts of negligence on the part of the defendant prior to and at the time of the death of plaintiff's intestate, as aforesaid:

"(a) The defendant carelessly and negligently failed and neglected to operate the gates at said crossing.

"(b) The defendant carelessly and negligently failed to maintain a watchman at said crossing to give warning of the approach of trains.

"(c) The defendant carelessly and negligently failed to maintain and operate a signal device at said crossing to give warning of the approach of trains.

"(d) The defendant so carelessly and negligently operated and managed said locomotive and train of cars that it ran into and against the automobile in which plaintiff's intestate was riding and caused her death.

"(e) The defendant carelessly and negligently operated said locomotive in that no bell or at least thirty cords weight or steam whistle on said locomotive were rung or sounded by the engineer or fireman at a distance of at least eighty rods from

said crossing and kept ringing or whistling until said crossing was reached by said locomotive engine, in violation of Section 6 of an Act entitled, "An Act in Relation to Fencing and Operating Railroads," approved March 31, 1874.

"(f) The defendant carelessly and negligently operated and ran said locomotive and train of cars over and across said railroad crossing at a greater rate of speed than was reasonable and proper under the circumstances and greater than the physical hazards of said crossing would permit with reasonable safety for persons lawfully travelling upon said street and over said crossing."

Count 2 of the complaint is identical with Count 1, with the exception of Paragraph 7, in which the plaintiff charges: "That the defendant, by and through its employees, servants and agents, willfully and wantonly ran and operated said locomotive engine and train of cars at a high, dangerous and excessive rate of speed and with a reckless abandon and conscious indifference to consequences toward and against said railroad crossing and then and there ran into and struck the automobile in which plaintiff's intestate was riding, as aforesaid, with great force and violence, and plaintiff's intestate willfully and wantonly killed."

Harry Harold, Administrator of the Estate of Dale Harry Harold, Deceased, Jason Mills, Administrator of the Estate of Eathel Mills, Deceased, and Flossie Charleson, Administratrix of the Estate of Warren Ellis Taplin, Deceased, each filed a complaint identical with Elias H. Trumbo except as to heirship.

said crossing and kept running or waiting until said crossing was reached by said locomotive engine, in violation of Section 6 of an Act entitled, "An Act in Relation to Running and Operating Railroads," approved March 21, 1874.

"(f) The defendant carelessly and negligently operated and ran said locomotive and train of cars over and across said railroad crossing at a greater rate of speed than was reasonable and proper under the circumstances and greater than the physical bounds of said crossing would permit with reasonable safety for persons lawfully travelling upon said street and over said crossing."

Count 2 of the complaint is identical with Count 1, with the exception of Paragraph 7, in which the plaintiff charges: "That the defendant, by and through its employees, servants and agents, willfully and wantonly ran and operated said locomotive engine and train of cars at a high, dangerous and excessive rate of speed and with a reckless disregard and conscious indifference to consequences toward and against said railroad crossing and then and there ran into and struck the automobile in which plaintiff's intestate was riding, as aforesaid, with great force and violence, and plaintiff's intestate willfully and wantonly killed."

Harry Harold, Administrator of the Estate of Nile Harry Harold, Deceased, Jason Mills, Administrator of the Estate of Ethel Mills, Deceased, and Josephine Charleson, Administratrix of the Estate of Warren Mills Taylor, Deceased, each filed a complaint identical with Miles H. Trumbo except as to certain.

The defendant filed its answer in which it denied that the motor vehicle traffic on Main Street in the Village of Leland, crossing said railroad tracks of the defendant, was intensive and heavy both day and night, as alleged. The defendant denies that said railroad crossing was a dangerous and hazardous crossing, and denies that it was the duty of the defendant to operate gates or signal devices, or maintain watchmen at said crossing at the time and on the occasion in question, in which the four persons were killed. The defendant denies that three of the plaintiffs were guests in the automobile and charges that they were engaged in a joint undertaking. The defendant denies that the railroad company acted in an unlawful and wanton manner, and denies that they were guilty of any carelessness, or negligence, as alleged in the bill of complaint.

The cases were consolidated for hearing and were tried before a jury. At the conclusion of the plaintiffs' evidence, the defendant entered a motion asking for an instruction to find the defendant not guilty. This motion was overruled, and the instruction refused. The defendant then offered its evidence. At the close of all of the evidence, it again entered a motion for a directed verdict and to find the defendant not guilty. This motion was likewise refused. The case was then submitted to the jury, which found the defendant guilty, and assessed damages for each of the plaintiffs at $4,500.00. The defendant then entered a motion for a judgment notwithstanding the verdict, or for a new trial. Each of these

The defendant filed its answer in which it denied that the motor vehicle traffic on Main Street in the Village of Leland, crossing said railroad tracks of the defendant, was intensive and heavy both day and night, as alleged. The defendant denies that said railroad crossing was a dangerous and hazardous crossing, and denies that it was the duty of the defendant to operate gates or signal devices, or maintain watchmen at said crossing at the time and on the occasion in question, in which the four persons were killed. The defendant denies that three of the plaintiffs were guests in the automobile and charges that they were engaged in a joint undertaking. The defendant denies that the railroad company acted in an unlawful and wanton manner, and denies that they were guilty of any carelessness, or negligence, as alleged in the bill of complaint.

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motions was overruled and judgment was entered on the verdict in favor of each of the plaintiffs. It is from these judgments that this appeal is prosecuted by the defendant.

It is insisted by the appellant that there is no evidence in the record showing that the plaintiffs, or any of them were in the exercise of due care and caution for their own safety at the time of the collision, which caused their death. In the appellant's brief, we find this language: "There was no dispute in the testimony that the persons in the fatal accident were careful, temperate and prudent persons; that their sight and hearing were good and that the two boys and Jeannette Trumbo were careful drivers." When the evidence was offered to show that these persons were prudent, careful persons, there was a general objection made by the defendant, without assigning any reason why the evidence was not proper. At the time this evidence was offered, it was proper to show the careful habits of the deceased, as tending to show that at the time of the accident in which they were killed, they were in the exercise of due care and caution for their own safety. The objection was made without stating any reason therefor. In Casey vs. Chicago Rys. Co., 269 Ill., Page 386 at Page 390, we find this language: "It was necessary for defendant in error to allege and prove that his decedent was in the exercise of due care and caution for his own safety at the time of the accident. In cases where there are no eye-witnesses to the occurrence this allegation cannot be proven by direct testimony, but it still devolves upon the parties seeking recovery to establish the exercise of

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ordinary care on the part of the deceased by the highest proof of which the case is capable. (Collison v. Illinois Central Railroad Co. 239 Ill. 532; Stollery v. Cicero and Proviso Street Railway Co. 243 id. 290; Newell v. Cleveland, Cincinnati, Chicago and St. Louis Railway company, 261 id. 505.) The highest proof of which the case is capable may consist of other circumstances than the habits of the deceased which would tend to raise the presumption that the deceased was in the exercise of due care and caution at the time for his own safety. Where it is possible, such circumstances must be shown. The absence of such circumstances does not preclude a plaintiff, however, and if the case is not susceptible of any higher proof, then the presumption that the deceased was in the exercise of ordinary care and caution for his own safety at the time of the accident is sufficiently raised by proof that he was habitually careful, prudent and cautious in his conduct. If the deceased was habitually prudent, careful and cautious it tended to raise the presumption that he was in the exercise of due care and caution at the time he received the injury which resulted in his death. (Chicago, Rock Island and Pacific Railway Co. v. Clark, 108 Ill. 113; Toledo, St. Louis and Kansas City Railroad Co. v. Bailey, 145 id. 159.) As the proof made relative to the habits of the deceased tended to raise this presumption it was sufficient to go to the jury."

As before stated, when this evidence was offered, there was a general objection, viz: "I object to that." The Court properly overruled the objection. The same question was decided

ordinary care on the part of the deceased in the highest degree of which the case is capable. (Collins v. Illinois Central Railroad Co. 239 Ill. 532; Stallery v. Diggs and Twelfth Street Railway Co. 242 id. 290; Sewell v. Cleveland, Cincinnati, Chicago and St. Louis Railway Company, 241 id. 408.) The highest proof of which the case is capable may consist of other circumstances than the habits of the deceased which would tend to raise the presumption that the deceased was in the exercise of due care and caution at the time for his own safety. Where it is possible, such circumstances must be shown. The absence of such circumstances does not preclude a plaintiff, however, and if the case is not susceptible of any higher proof, then the presumption that the deceased was in the exercise of ordinary care and caution for his own safety at the time of the accident is sufficiently raised by proof that he was habitually careful, prudent and cautious in all conduct. If the deceased was habitually prudent, careful and cautious it tended to raise the presumption that he was in the exercise of due care and caution at the time he received the injury which resulted in his death. (Chicago, Rock Island and Pacific Railway Co. v. Clark, 108 Ill. 112; Toledo, St. Louis and Kansas City Railroad Co. v. Bailey, 145 id. 150.) In the proof made relative to the habits of the deceased tended to raise this presumption it was sufficient to go to the jury."

As before stated, when this evidence was offered, there was a general objection, viz: "I object to that." The Court properly overruled the objection. The same question was decided

by the Supreme Court in the case of Young vs. Patrick, 323 Ill. Page 200 at page 202 it is stated what is necessary for the defendant to do in order to prevent plaintiff from introducing such evidence, and it is as follows: "Plaintiff in error on the trial introduced a number of witnesses who testified as to habits of care on the part of the deceased. This testimony was admitted over objection of defendant in error, the latter contending that there was an eye-witness to the accident, but his counsel did not state who the eye-witness was. A defendant may not obtain the benefit of the rule prohibiting evidence of habits of care on the part of the deceased where there is an eye-witness unless he first tender the name and address of a witness competent to testify on the trial." The evidence of due care of decedents in this case was properly admitted.

The following facts in this case are not disputed. The evidence shows that the Village of Leland is a prosperous village of about 600 inhabitants in the northern part of LaSalle County. Where Main Street crosses the Chicago, Burlington and Quincy Railroad tracks at the northwest corner of the intersection, is what is commonly called a "blind corner." While approaching from the north to said tracks, a person could not see an approaching train coming from the west until it came even with the south side of the elevator next to the switch track on the north; which is about 45 feet from this eastbound railroad track. Jeannette Trumbo lived about 6 miles Northeast of Ottawa, Illinois, and her sister, Mrs. Ekdahl, lived in Leland

by the Supreme Court in the case of Young vs. Parker, 329 Ill. Page 200 at page 202 it is stated that is necessary for the defendant to do in order to prevent plaintiff from introducing such evidence, and it is as follows: "Plaintiff in error on the trial introduced a number of witnesses who testified as to habits of care on the part of the deceased. This testimony was admitted over objection of defendant in error, the latter contending that there was an eye-witness to the accident, but his counsel did not state who the eye-witness was. A defendant may not obtain the benefit of the rule prohibiting evidence of habits of care on the part of the deceased where there is an eye-witness unless he first tender the name and address of a witness competent to testify on the trial." The evidence of the case of Gaudette in this case was properly admitted.

The following facts in this case are not disputed. The evidence shows that the Village of Leland is a prosperous village of about 600 inhabitants in the northern part of Lasalle County. Where Main Street crosses the Union, Burlington and Quincy Railroad tracks at the north west corner of the intersection, is what is commonly called a "blind corner." While approaching from the north to said tracks, a person could not see an approaching train coming from the west until it came even with the south side of the elevator next to the switch track on the north; which is about 40 feet from this eastbound railroad track. Jeannette Trumbo lived about 3 miles Northeast of Ottawa, Illinois, and her sister, Mrs. Gaudet, lived in Leland

and intended to go to Florida on November 10th. Elias H. Trumbo, husband of Jeannette Trumbo, had in his employ one Harry Harold who lived in his tenant house at the rear of the Trumbo home. He had a son named Dale Harry Harold who was in the army and who was home on a furlough. He had another soldier named Warren Ellis Taplin, as a guest at the Harold home. Eathel Mills was a seamstress and was also at the Harold home. They all left the Trumbo home and took Dale Howard's car and started for Leland to visit Mrs. Ekdahl. They arrived at Mrs. Ekdahl's home about 8:30 in the evening of November 9th. They visited at her home until 2:00 o'clock when they started home and were all killed. A freight train coming from the west was being driven approximately at a rate of speed of 50 miles an hour. The engineer, who was sitting on the right side of the engine, could not see the car approaching. The fireman testified he was on the left side of the engine, and that as he was approaching the crossing, he was looking to see that the signal was clear to go ahead; that when he was within approximately 100 feet of the crossing, he saw a car start to cross the tracks and it struck the front part or side of what is called the cowcatcher; that he noticed the car was covered with frost, and the windows were all frosted over; that the automobile was travelling 35 miles per hour, and did not slacken any from the time it came into view until the collision.

The train crew testified that the bell was ringing and that the whistle blew as the train came through the Village of Leland. The Leland night watchman testified that he was within

and intended to go to Florida on November 1st. Since a
friendly husband of Henriette Trembo, that is his widow and
Harry Herold who lived in his family home at the rear of the
Trembo home. He had a son named Jack Herold who was in
the army and who was home on a furlough. He was another soldier
named Warren Willis Taylor, as a guest at the Herold home. Ezekiel
Willis was a seamstress and was also at the Herold home. They
all left the Trembo home and took Herold's car and started
for Island to visit Mrs. Edmund. They arrived at Mrs. Edmund's
home about 2:30 in the evening of November 7th. They visited at
her home until 2:00 o'clock and then they started home and were all
killed. A freight train coming from the west was being driven
approximately at a rate of speed of 60 miles an hour. The
engineer, who was sitting on the right side of the engine,
could not see the car approaching. The fireman, sitting on
the left side of the engine, and who was expecting
the crossing, he was looking to see that the signal was clear to
go ahead; that when he was within approximately 100 feet of the
crossing, he saw a car start to cross the tracks and it across
the front part or side of what is called the cowcatcher; that
he pulled the car was covered with frost, and the windows
were all frosted over; that the locomotive was travelling 60
miles per hour, and did not slacken any from the time it came
into view until the collision.

The train crew testified that the bell was clanging and
that the whistle blew as the train came through the village of
Island. The Island night watchman testified that he was within

a block of the crossing at the time of the collision, and he did not hear any whistle blown; that his hearing was good, and that if it had been blown he thought he would have heard it. He did not say that it had not blown. A great many photographs were introduced in evidence to show the nature of the crossing. It is agreed that the railroad company maintained a watchman and operated gates at this crossing from 5:10 o'clock in the morning to 10:30 o'clock in the evening.

At 8:30 p.m. the time the plaintiffs' intestates drove over this crossing, no doubt, the watchman was guarding the crossing. A short distance north of the railroad track is a sign with reflectors. When headlights shine upon it, it shows the words, "Gates not working." The evidence also shows that from 500 to 600 automobiles use this crossing daily; that approximately 100 cars from 10:00 o'clock at night until 5:00 o'clock in the morning, use the crossing. The evidence is confusing as to the number of trains that pass over this crossing daily. The operator employed by the defendant company one time said 71 and another time 34.

Mrs. Ekdahl lived a block and a half north and a block west of this crossing. In the statement of facts of the appellant's brief, we find this language: "The Ekdahl home was northwest of the crossing, and there were only two available routes to the crossing. The one most used would require that the car be turned right from Washington Street onto Main Street at a point approximately 114 feet from the first track of the railroad crossing. The other would bring the car onto Main

a block of the crossing at the time of the collision, and he did not hear any whistle blown; that the warning was late, and that if it had been blown he thought he would have heard it. He did not say that it had not blown. A great many witnesses were introduced in evidence to show the nature of the crossing. It is agreed that the railroad company maintained a watchman and operated gates at this crossing from 6:10 o'clock in the morning to 10:30 o'clock in the evening.

At 8:30 p.m. the time the plaintiff's intestate drove over this crossing, no doubt, the watchman was operating the crossing. A short distance north of the railroad track is a sign with reflectors. When headlights shine upon it, it shows the words, "Gates not working." The evidence also shows that from 500 to 700 automobiles use this crossing daily; that approximately 100 cars from 10:00 o'clock at night until 5:00 o'clock in the morning, use the crossing. The evidence is conflicting as to the number of trains that pass over this crossing daily. The conductor employed by the defendant company one time said 71 and another time 54.

Mrs. Hudson lived a block and a half north and a block east of this crossing. In the statement of facts of the appellant's brief, we find this language: "The Hudson home was northwest of the crossing, and there were only two available routes to the crossing. The one most used would require that the car be turned right from Washington Street onto Main Street at a point approximately 114 feet from the first track of the railroad crossing. The other would bring the car onto Main

Street a block farther from the crossing." We think that the evidence sustains these statements of the appellant. It is claimed by appellees that in making a right-hand turn from Washington Street into Main Street at night, it is doubtful if the automobile lights would shine upon this sign which says: "Gates not working," as the car would be even with, or south of the sign, before the lights could illuminate it. Whether this was true or not, was a question for the jury to determine.

The appellant argues that the evidence fails to show that this was a dangerous crossing, since it had been more than 20 years since a person had been killed at this same place. This evidence was brought out by the defendant in his cross-examination of the night watchman, Mr. Elliott, when asked the name of the man who had been killed, he said it was "Yocklit." The appellees have cited to this Court the case of the C. B. & Q. R. Company vs. Gunderson. George Gunderson was killed at this same crossing by a Burlington train. Gunderson's widow, Anna, procured a judgment against the railroad Co., for the unlawful death of her husband in which it is charged that the defendant was guilty of wilful and wanton conduct, by running a train at an excessive rate of speed through the Village of Leland. This Court affirmed the judgment. The case was carried to the Supreme Court and reported in 174 Ill. Page 495, where the Supreme Court affirmed the Appellate Court's decision. The appellees contend that this is an authority to show that the defendant was guilty of wilful and wanton conduct in the operation of their freight train in this case. We did not so consider it, as in the Gunderson case, at the time of the accident, the Village

Street a block farther from the crossing." We think that the evidence sustains these statements of the appellant. It is claimed by appellees that in making a right-hand turn from Washington Street into Main Street at night, it is material if the automobile lights would shine upon this sign which says: "Tracks not working," as the car would be even with, or south of this sign, before the lights could illuminate it. Whether this was true or not, was a question for the jury to determine.

The appellant argues that the evidence fails to show that this was a dangerous crossing, since it had been more than 20 years since a person had been killed at this same place. This evidence was brought out by the defendant in his cross-examination of the night watchman, Mr. Elliott, when asked the name of the man who had been killed, he said it was "Tocelli." The appellees have cited to this Court the case of Ind. & I. R. R. Company vs. Anderson. George Anderson was killed at this same crossing by a Darlington train. Anderson's widow, Anna, procured a judgment against the railroad Co., for the wrongful death of her husband in which it is claimed that the defendant was guilty of willful and wanton conduct, by running a train at an excessive rate of speed through the village of Lafayette. This Court affirmed the judgment. The case was carried to the Supreme Court and reported in 174 Ill. Page 497, where the Supreme Court affirmed the appellate court's decision. The appellees contend that this is an authority to show that the defendant was guilty of willful and wanton conduct in the operation of their freight train in this case. We did not so consider it, as in the Anderson case, at the time of the accident, the village

of Leland had an ordinance regulating the speed of trains going through the Village, and the evidence shows that the defendant was guilty of violating this ordinance. In the present case the plaintiffs charge the violation of an ordinance of the Village of Leland, but on motion of the defendant, that part of the complaint was stricken.

The appellant argues that the Court erred in overruling its motion, at the close of the plaintiffs' evidence, and at the close of all of the evidence, for a directed verdict. They contend that their motion was a specific motion, and the Court could not properly overrule the motion, but could take any, all, or a part of the case from the jury. It is our conclusion that the motions were general in character, and not specific and if the Court was of the opinion that the case should go to the jury on the negligence counts, the motion would necessarily have to be overruled. In the case of Smithers vs. Henriquez, 368 Ill. Page 598, we find this language: "There was no error in denying the motion in arrest of judgment. The claim is that the general verdict cannot support a judgment because of the want of any evidence to support the wilful and wanton count. Section 68 of the Civil Practice act (Ill. Rev. Stat. 1937, chap. 110, par. 192) provides that whenever there are several counts in a complaint based on different demands, the court shall, on the demand of either party, direct the jury to find a separate verdict upon each. Defendant filed only a general motion for a directed verdict. He could have availed himself

of Leland had an ordinance regulating the speed of trains going through the Village, and the evidence shows that the defendant was guilty of violating this ordinance. In the present case the plaintiffs charge the violation of an ordinance of the Village of Leland, but on motion of the defendant, that part of the complaint was stricken.

The appellant argues that the Court erred in sustaining his motion, at the close of the plaintiffs' evidence, and at the close of all of the evidence, for a directed verdict. They contend that their motion was a specific motion, and the Court could not properly overrule the motion, but could take any, all, or a part of the case from the jury. It is our conclusion that the motions were general in character, and not specific and if the Court was of the opinion that the case should go to the jury on the negligence counts, the motion would necessarily have to be overruled. In the case of Mulhers vs. Hermines, 308 Ill. Page 339, we find this language: "There was no error in denying the motion in arrest of judgment. The claim is that the general verdict cannot support a judgment because of the want of any evidence to support the willful and wanton count. Section 25 of the Civil Practice act (Ill. Rev. Stat. 1927, chap. 110, par. 192) provides that whenever there are several counts in a complaint based on different demands, the court shall, on the demand of either party, direct the jury to find a separate verdict upon each. Defendant filed only a general motion for a directed verdict. He could have applied himself

of the provisions of the statute by demanding a separate verdict on the different counts, or he could have moved for the withdrawal of the wilful and wanton count. By failing to do either, he is not in a position to complain."

The defendant contends that the evidence of the careful habits of the plaintiffs was not a proper thing to be considered by the jury, because they produced an eye-witness who actually saw the accident. If the defendant wished to raise this question at the trial, it should have made a motion to exclude this evidence, but this was not done. The evidence was properly submitted to the jury for their consideration, and it was for them to determine from the evidence of careful and prudent habits of the deceased parties, and all the circumstances in evidence, whether the fireman was correct in his testimony as to what he saw just before the collision. The trial court properly overruled the defendant's motions for a directed verdict.

The appellant claims that it was not the duty of the railroad company to maintain crossing protection in addition to the Statutory requirements, unless the Illinois Commerce Commission requires it. They contend that they have fully complied with all the rules and regulations of the Illinois Commerce Commission, therefore there was no negligence in any way in maintaining their crossing. They cite several cases as supporting this contention. An examination of these cases does not sustain their claim. In the case of Wagner vs. The T. P. & W. Railroad Company, 352 Ill. Page 85, on page 90 the Supreme Court uses this language: "But regardless of the situation

of the provisions of the statute by demanding a separate verdict on the different counts, or he could have moved for the withdrawal of the sixth and seventh count. By failing to do either, he is not in a position to complain."

The defendant contends that the evidence of the property liability of the plaintiffs was not a proper ruling to be considered by the jury, because they produced an eye-witness who actually saw the accident. If the defendant wished to raise this question at the trial, it should have made a motion to exclude this evidence, but this was not done. The evidence was properly submitted to the jury for their consideration, and it was for them to determine from the evidence of careful and prudent habits of the deceased parties, and all the circumstances in evidence, whether the fireman was correct in his testimony or he was as he saw just before the collision. The trial court properly overruled the defendant's motions for a directed verdict.

The appellant claims that it was not the duty of the railroad company to maintain crossing protection in addition to the statutory requirements, unless the Illinois Commerce Commission requires it. They contend that they have fully complied with all the rules and regulations of the Illinois Commerce Commission, therefore there was no negligence in any way in maintaining their crossing. They cite several cases as supporting this contention. An examination of these cases does not sustain their claim. In the case of Wagner vs. The C. C. & S. Railroad Company, 322 Ill. Page 65, on page 70 the Supreme Court uses this language: "But regardless of the situation

produced by the failure to prove an order of the commission, there is a common law duty devolving upon railroads to exercise such care and use such precautions as will enable the traveler on the highway, if he exercises ordinary care, to ascertain in the night time the approach of a train over a street crossing such as the testimony shows this one to have been. Special conditions creating special hazards at crossings require a watchman, gates or other warning to travelers. Opp v. Pryor, 294 Ill. 538. ** A railroad company in the running of its trains is required to exercise ordinary care and prudence to guard against injury to those who may be traveling upon the public highway and crossing its tracks. The fact that the statute may provide one precaution does not relieve the company from adopting such others as public safety or common prudence may dictate." To the same effect is Lauer vs. Elgin, J. & E. Ry. Co., 305 Ill. App. page 200; Goodman vs. Chicago & E. I. Ry. Co., 248 Ill. App. page 128 and Willett vs. B. & O. Ry. Co., 284 Ill. App. page 307. Neering vs. I. C. R. R. Co., 383 Ill. 366 at 382.

The complainants in the present case charge that there was an unusual and dangerous situation and cast upon the railroad company extra duties in the operation of their trains and the maintenance of the crossings; that the railroad company recognized the duty of operating gates and of keeping flagmen at this crossing in the daytime and part of the night, for the purpose of warning travellers of the danger at this crossing.

produced by the failure to prove a order of the commission, there is a common law duty devolving upon railroads to exercise such care and use such precautions as will enable the traveler on the highway, if he exercises reasonable care, to recognize in the night time the approach of a train and a street crossing as soon as the testimony shows this one to have been. Special conditions sometimes require railroads to maintain a flagman, gates or other warning to travelers. Ohio v. Pryor, 244 Ill. 535. "A railroad company in the running of its trains is required to exercise ordinary care and prudence to guard against injury to those who may be traveling upon the public highway and crossing its tracks. The fact that the statute may provide one precaution does not relieve the company from adopting such others as public safety or common prudence may dictate." To the same effect is Chicago, Ill. & S. Ry. Co., 308 Ill. App. where Judge Dady concurred. Chicago & E. I. Ry. Co., 248 Ill. App. where Lee and Niblack and C. & E. I. Ry. Co., 238 Ill. App. page 607. Pearson vs. C. C. R. R. Co., 242 Ill. 306 at 308.

The complainants in the case at bar claim that there was an unusual and dangerous situation and cast upon the railroad company extra duties in the operation of their trains and the maintenance of the crossings; that the railroad company recognized the duty of constant gates and of keeping flagmen at this crossing in the daytime and part of the night, for the purpose of warning travelers of the danger at this crossing.

Whether it was negligence on the part of the defendant to fail to operate the gates, or whether a flagman should have been employed, or whether there should have been signalling devices of some kind maintained at the time of the accident to warn the travelling public of the danger at this crossing, were questions for the jury to decide. Lauer vs. Elgin J. & E. Ry. Co., 305 Ill. App. 200, supra.

It is also insisted by the defendant that it is not wilful and wanton conduct on the part of the defendant to operate a freight train through the Village of Leland at any time, at the rate of 50 miles per hour. The plaintiff does not plead, the charge of wilful and wanton misconduct solely on the ground of the speed of the train in question. They charge that under all the circumstances including the facts that there was no watchman, and the gates not in operation, and that the elevator in question, obscured the view of people coming from the north, and that the crossing was a hazardous and dangerous one, and no adequate warning signs given, and taking all these matters into consideration, it was then a question of fact for the jury to decide whether the plaintiffs had sustained their charge of wilful and wanton misconduct.

What is wilful and wanton misconduct, is always a question of fact and varies in each individual case. In the case of Bartolucci vs. Falleti, 382 Ill. page 168 at page 174 our Supreme Court in defining, "wilful and wanton misconduct" says: "Ill will is not a necessary element of a wanton act. To constitute an act wanton, the party doing the act or failing to act must be conscious

whether it was negligence on the part of the defendant to fail to operate the gates, or whether a lookout should have been employed, or whether there should have been diversion devices of some kind maintained at the cross of our railroad to warn the travelling public of the danger at this crossing, were questions for the jury to decide. Lagan vs. Miss. L. & R. Co., 200 Ill. App. 203, supra.

It is also insisted by the defendant that it is not willful and wanton conduct on the part of the defendant to operate a freight train through the village of Leland at any time, at the rate of 20 miles per hour. The plaintiff does not plead, the charge of willful and wanton misconduct solely on the ground of the speed of the train in question. Their charge that under all the circumstances including the fact that there was no watchman, and the gates not in operation, and that the plaintiff in question, obscured the view of persons coming from the south, and that the crossing was a dangerous and hazardous one, and no adequate warning signs given, and taking all these matters into consideration, it was then a question of fact for the jury to decide whether the plaintiff's had established their charge of willful and wanton misconduct.

What is willful and wanton misconduct, is always a question of fact and varies in each individual case. In the case of Bartolucci vs. Iaiatti, 300 Ill. page 168 at page 174 our Supreme Court in defining "willful and wanton misconduct" says: "It will is not a necessary element of a wanton act. It constitutes a wanton act, the party doing the act or failing to act must be conscious

of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness. Streeter v. Humrichouse, 357 Ill. 234; Jeneary v. Chicago and Interurban Traction Co. 306 id. 392." Under the circumstances, as shown in these cases, we think it was a question of fact to be submitted to the jury.

Appellant claims that the Court erred in giving to the jury instructions based upon wilful and wanton conduct and denying and modifying certain instructions offered by the defendant concerning contributory negligence. Plaintiffs' instructions 2, 3, 4, 5 and 6 stated the law relative to wilful and wanton misconduct and are practically the same, with the exception of the names of the plaintiffs. The defendant's modified instructions numbers 8, 9, 10, 11, 12 and 13 are concerning contributory negligence, which the Court considered did not apply to wilful and wanton misconduct against the plaintiffs' complaint and so changed and modified them so they only applied to the negligence charged in the various complaints. The Court did not err in giving the plaintiffs or the defendants modified instructions.

of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. In intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness. Streeter v. Sumrlin Ohnes, 307 Ill. 324; Jensen v. Chicago and Lake Shore Traction Co. 308 Id. 391." Under the circumstances, as shown in these cases, we think it was a question of fact to be submitted to the jury.

Appellant claims that the court erred in giving to the jury instructions based upon willful and wanton conduct and varying and modifying certain instructions offered by the defendant's concerning contributory negligence. Plaintiff's instructions 2, 3, 4, 5 and 6 state the law relative to willful and wanton misconduct and are practically the same, with the exception of the name of the plaintiffs. The defendant's modified instructions numbers 9, 10, 11, 12 and 13 are concerning contributory negligence, which the court considered did not apply to willful and wanton misconduct against the plaintiffs' contention and so changed and modified them so they only applied to the negligence charged in the various complaints. The court did not err in giving the plaintiffs or the defendants modified instructions.

It is also charged that the negligence of the driver of the car should be imputed to other occupants of the car. In the appellant's argument, it is stated: "Negligence of the driver of an automobile ordinarily is not imputed to other occupants of the vehicle, unless they are engaged in a joint enterprise." We find no evidence in this record that the parties in the automobile at the time of the fatal accident were concerned in any joint enterprise, but were as the plaintiffs claim, guests in the car; therefore, the negligence of the driver, if any, should not be imputed to the other occupants of the car.

The defendant complains that the Court refused to give its instruction No. 5, which is as follows: "The Court instructs the jury, if you believe from the evidence, that the automobile in which Plaintiffs' intestates, Jeanette Trumbo, Dale Harry Harold and Eathel Mills, were riding, approached the track upon which defendant's train was traveling, the servant of the defendant, Polard, had the right to assume, until he knew to the contrary, or in the exercise of reasonable care would have known the same, that the said automobile would stop to allow the train of the defendant to pass, and defendant cannot be charged with the duty to slow down or attempt to stop its train until the said Polard knew or by the exercise of reasonable care should have known, that said automobile did not intend to stop and let the train pass." No doubt in certain cases this instruction would be proper, but under the circumstances as appear in this case, the instruction should not have

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The defendant complains that the Court refused to give its instruction No. 5, which is as follows: "The Court instructs the jury, if you believe from the evidence, that the automobile in which plaintiffs' intestates, Jeanette Prendergast, Dale Harry Harold and Esther Hills, were riding, approached the track upon which defendant's train was travelling, the servant of the defendant, Poland, had the right to assume, until he knew to the contrary, or in the exercise of reasonable care would have known the same, that the said automobile would stop to allow the train of the defendant to pass, and defendant cannot be charged with the duty to slow down or attempt to stop its train until the said Poland knew or by the exercise of reasonable care should have known, that said automobile did not intend to stop and let the train pass." We doubt in certain cases this instruction would be proper, but under the circumstances as appear in this case, the instruction should not have

been given. There is no charge by the plaintiffs, or proof in the record that would sustain the giving of this instruction, so the Court properly refused the same.

In this case the jury had for their consideration, that four careful and prudent persons were riding in an automobile. Three of them were experienced and careful drivers. They had been over this railroad crossing for the first time, so far as the record discloses at about 8:30 p.m. At that time the gates were in operation and the watchman on duty. They visited at the home of their friend, located practically two and one-half blocks northwest of the crossing. There is no evidence of their drinking, or any misconduct on the part of any one. The probable road for them to take on going home was to drive one block south, then east a block, and then a short distance to the railroad crossing. There was an illuminated sign showing the words, "gates not working," on the west side of the street between the crossing and Washington Street. There was a building adjacent to the north railroad track that obstructed the view of the decedents until they were approximately at the north railroad track. There were four cross-arms, at, or near the crossing, which were studded with reflector lights. The railroad gates were open, and no watchman on duty to warn them of approaching danger. Other people had been killed at this same crossing by the trains of the defendant. The freight train involved in this fatal accident was running at a speed of 50 miles per hour. The only living person that saw the accident was the fireman of this train who

been given. There is no charge by the plaintiffs, or proof in the record that would sustain the giving of this instruction, so the Court properly refused the same.

In this case the jury had for their consideration, that four careful and prudent persons were riding in an automobile. Three of them were experienced and careful drivers. They had never crossed this railroad crossing for the first time, so far as the record discloses at about 4:30 p.m. At that time the gates were in operation and the watchman on duty. They visited at the home of their friend, Lowter approximately two and one-half blocks northwest of the crossing. There is no evidence of their drinking, or any disorderliness on the part of any one. The crossing road for them to take on going home was to drive one block south, then east a block, and then a short distance to the railroad crossing. There was an illuminated sign showing the words, "Crossing working," on the west side of the street between the crossing and Washington Street. There was a building adjacent to the north railroad track that obstructed the view of the approaching train. They were approximately at the north railroad track. There were four cross-arms, at, or near the crossing, which were studded with reflector lights. The railroad gates were open, and the watchman on duty to warn those of approaching trains. Other people had been killed at this same crossing by the trains of the defendant. The deceased train involved in this fatal accident was running at a speed of 60 miles per hour. The only lighted person that saw the accident was the fireman of this train who

claims he saw it at approximately 100 feet from the place of the accident. A train running at 50 miles per hour is going approximately 75 feet per second, so that the fireman at the most, did not see the approaching car more than one and one-fourth part of a second. One witness says that he, at the time of the accident, was within one block of this crossing and did not hear a whistle blow, but there is evidence that the whistle was blown and the bell ringing. These facts were all presented to the jury for their consideration. The Court did not err in the admission of, or rejecting any evidence, nor is there any error in the Court's instruction; therefore, it became purely a question of fact for the jury to determine the guilt or innocence of the defendant.

It has frequently been held that unless the appellate court can say that the verdict of the jury is against the manifest weight of the evidence, it should not substitute its judgment for that of the jury. In the present case we cannot say that the verdict of the jury is against the manifest weight of the evidence, and the judgments of the trial court are affirmed.

Judgments affirmed.

Dunn P.J. dissents.

claims he saw it at approximately 100 feet from the place of the accident. A train running at 30 miles per hour is going approximately 75 feet per second, so that the fireman at the most, did not see the approaching car more than one and one-fourth part of a second. One witness says that he, at the time of the accident, was within one block of the crossing and did not hear a whistle blow, but there is evidence that the whistle was blown and the bell rung. These facts were all presented to the jury for their consideration. The Court did not err in the admission of, or rejecting any evidence, nor is there any error in the Court's instruction; therefore, it became purely a question of fact for the jury to determine the guilt or innocence of the defendant.

It has frequently been held that unless the appellate court can say that the verdict of the jury is against the manifest weight of the evidence, it should not substitute its judgment for that of the jury. In the present case we cannot say that the verdict of the jury is against the manifest weight of the evidence, and the judgments of the trial court are affirmed.

Judgments affirmed.

42801

JOHN M. HANNAHER et al.,
Appellees,

v.

BLUE CAB COMPANY, Inc., a corporation,
Appellant.

322 I.A. 277

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

John M. Hannaher, his wife Gladys, and his stepdaughter Corinne M. Hanson, were injured while riding as passengers in one of defendant's cabs which collided with an automobile at the intersection of Park avenue and Augusta street in the Village of River Forest, Illinois. Their suit for damages resulted in verdicts and judgment, respectively, in the sum of $5,000 for John M. Hannaher, $1,200 for his wife, and $200 for Miss Hanson, from which defendant appeals.

The accident occurred about 3:00 o'clock in the afternoon on September 27, 1941, a clear fall day. Plaintiffs had engaged the cab and were being driven to Rosary College, River Forest. The taxicab proceeded north on Park avenue in River Forest, and at or in its intersection with Augusta street a collision occurred with a westbound automobile driven by Peter J. Bach. The manner in which the accident occurred and the circumstances attending the collision of the two cars are related by the several witnesses who testified for plaintiffs, and Lloyd Davidson, driver of defendant's taxicab, who was the sole occurrence witness for defendant. Miss Hanson stated that "after we passed Chicago Avenue, the cab did not stop or slow down at any other intersecting street;" that the cab was about 50 feet from the intersecting street when she saw the westbound car approaching about 35 feet from the intersection; that the cab was going 40 to 45 miles an hour approaching the intersection, and Bach's car was traveling at a speed of about 30 to 35 miles; and that before the crash "I hollered, look out, the

John W. HANNAMER et al.,
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corporation,
Appellant.

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John W. Hannamer, his wife Gladys, and his stepdaughter Corinne H. Hanson, were injured while riding as passengers in one of defendant's cabs which collided with an automobile at the intersection of Park avenue and Madison street in the Village of River Forest, Illinois. Their suit for damages resulted in verdicts and judgment, respectively, in the sum of $5,000 for John W. Hannamer, $1,200 for his wife, and $200 for Miss Hanson, from which defendant appeals.

The accident occurred about 3:00 o'clock in the afternoon on September 27, 1941, a clear fall day. Plaintiffs had engaged the cab and were being driven to Rosary College, River Forest. The taxicab proceeded north on Park avenue in River Forest, and at or in its intersection with Madison street a collision occurred with a westbound automobile driven by Peter J. Bach. The manner in which the accident occurred and the circumstances attending the collision of the two cars are related by the several witnesses who testified for plaintiff, and Lloyd Davidson, driver of defendant's taxicab, who was the sole occurrence witness for defendant. Miss Hanson stated that "after we passed Chicago Avenue, the cab did not stop or slow down at any other intersecting street;" that the cab was about 70 feet from the intersecting street when she saw the westbound car approaching about 35 feet from the intersection; that the cab was going 40 to 45 miles an hour approaching the intersection, and Bach's car was traveling at a speed of about 30 to 35 miles; and that before the crash "I believed, look out, the

car," but the driver did not change his speed.

Bach, testifying on behalf of plaintiffs, stated that he was driving his automobile west on Augusta street on his way to work at Lake street and Mannheim road; that Augusta was a through street in Chicago, but not after it entered Oak Park; that he was about 50 feet from the curb line at Park avenue when he saw defendant's cab 100 feet on his left, going about 50 miles an hour; that his speed was about 35 miles an hour; that when he saw defendant's cab he applied the brakes but the cab kept on going, and when the two vehicles collided the cab was slightly more than a foot north of the center line and three or four feet from the curb; that he turned right when the crash occurred and his car came to rest at the curb on the northwest corner of the intersection, and defendant's cab ended up north of the sidewalk on the west side of the street against a lamp post just north of Augusta street. His left front fender, right front fender and hood, radiator and grill, bumpers, headlights and windshield were all smashed in the impact with defendant's cab.

Arthur Pochert, superintendent of streets for the Village of River Forest, testifying for plaintiffs, stated that vehicular traffic was not required to stop at the intersection; that there were warning signs painted on the pavement of Park avenue north and south of Augusta street, spread over a distance of about 75 feet, with no signs on Augusta street at the time of the accident.

George F. Rauch, another of plaintiffs' witnesses, was a sergeant of police in River Forest. He arrived at the site of the accident on a radio call and stated that neither street was regarded as a stop street. When he arrived at the intersection the Blue cab was facing south on the northwest corner of the parkway between the curb and sidewalk, and Bach's car was just west of Park avenue, facing in a northeasterly direction with its front

car," but the driver did not change his speed.

Beck, testifying on behalf of plaintiffs, stated that he was driving his automobile west on Augusta street on his way to work at Lake street and Kenmore road; that Augusta was a through street in Chicago, but not after it entered Oak Park; that he was about 50 feet from the curb line at Park avenue when he saw defendant's cab 100 feet on his left, going about 35 miles an hour; that his speed was about 25 miles an hour; that when he saw defendant's cab he applied the brakes but the car kept on going, and when the two vehicles collided the cab was slightly more than a foot north of the center line and three or four feet from the curb; that he turned right when the crash occurred and his car came to rest at the curb on the northwest corner of the intersection, and defendant's cab ended up north of the sidewalk on the west side of the street against a lamp post just north of Augusta street. The left front fender, right front fender and hood, radiator and grill, bumpers, headlights and windshield were all smashed in the impact with defendant's cab.

Arthur Cooper, superintendent of streets for the Village of River Forest, testifying for plaintiffs, stated that vehicular traffic was not required to stop at the intersection; that there were warning signs painted on the pavement of Park avenue north and south of Augusta street, spread over a distance of about 75 feet, with no signs on Augusta street at the time of the accident.

George W. Hanel, another of plaintiffs' witnesses, was a sergeant of police in River Forest. He arrived at the site of the accident on a radio call and stated that neither street was regarded as a stop street. When he arrived at the intersection the Blue cab was facing south on the northwest corner of the parkway between the curb and sidewalk, and Beck's car was just west of Park avenue, facing in a northeasterly direction with its front

end close to the north curb of Augusta street; and he further testified that the front end of Bach's car was smashed, and that the right side of the cab from the back door to the rear had also been smashed. With a steel tape he measured the skid marks made by Bach's car and found that they extended over a space of 48-1/2 feet, straight east and west.

Lloyd Davidson, driver of the cab, described the route he took to the intersection where the accident occurred. After he crossed Iowa street in River Forest, which is one block south of Augusta, he picked up speed as he approached the intersection. He was aware of the fact that there were "slow" signs marked on the pavement as it approached Augusta street, and stated that he was going 22 to 25 miles an hour, driving in the center of the northbound lane. As he approached Augusta street, "probably fifty feet from the intersection, I took my foot off the accelerator and looked to my right. On that corner as you look to your right, there is quite a large residence. It sets back and they have quite a bit of trees and shrubbery in their front and side. When I looked to my right, I could see probably a quarter of a block, one hundred feet, down Augusta. I did not see any traffic coming from the east. I looked quick to my left and did not see anything coming from the west. After I had looked to the right and the left, I was then up to the south end of the intersection, the south curbing of the intersection. I put my foot back on the accelerator and started to look straight ahead of me. When I got to the center line of Augusta, I heard a screeching of brakes. I looked to my right and a car is coming toward me at a terrific rate of speed. It was probably forty or fifty feet east of me. I put my foot on the gas and tried to go forward ahead faster and at the same time pull my car to my left to get away, but there was a flash. It was instantly I was hit. The right rear of my car was hit in the impact. *** I did not

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and close to the north curb of Augusta street, that the front
end of Duck's car was smashed, and that the right side of the
cab from the back door to the rear had also been smashed, with
a steel tape he measured the skid marks made by Duck's car and
found that they extended over a space of 40-1/2 feet, straight
east and west.

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hear any signal from this westbound car before the accident happened; I did hear a lot of screeching of brakes." On cross-examination he testified: "My business is to get through with my fare as quickly and safely as possible. The faster you drive the quicker you finish your trip, the more money you make; that is proven in any commission job. *** I was familiar with the highway there; I had driven northward on it several times previously. I was familiar with the markings on the street. They had slow signs and danger signs commencing back from the intersection of Augusta about 75 to 100 feet, painted on the pavement. I saw those signs on this occasion; I knew what they meant. I am familiar with the motor vehicle act as to the speed in residential districts. I know that twenty miles an hour is approximately the speed to drive in a residence neighborhood of that kind. I was driving at approximately that speed. *** My first duty would be not to look first to the left but to my right. I ordinarily look to my right; I did on this occasion. I looked to my right first. Looking to my left there is a large house up closer to that corner. My view wasn't quite as good to the west as it was to the east. I could see much better to the right; I could see further down the street to my right. When I looked left to the west, I was just about at the south curbing of the intersection. I was going about eighteen, twenty miles at that time. When I looked to the right, I was back fifty feet, and I could see about one hundred feet down Augusta. While I was traveling that fifty feet, I did not look again to the east; I had looked there, and then looked to my left. From the time I was fifty feet south of Augusta, I did not look east again until I passed the south curbing of the intersection. I was just into the center of the center line of the intersection when I looked east again. The center of my car was just about in the center of Augusta street when I looked east again, and saw something coming from the east. I hadn't increased my speed then over what I had been going before, something like eighteen

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or twenty miles an hour. Going at that speed, you might be able to stop a car in twenty-five, twenty-eight feet. *** My brakes were perfect. *** I did not use my brakes before this accident happened. I took my foot off the accelerator; as I rule, I touch the brake pedal when approaching an intersection. I did not apply them at that time, either before or after the accident."

It is first urged as ground for reversal that the court erred in refusing to direct a verdict for defendant at the close of all the evidence. It is well settled that on motion for a directed verdict the court can consider only the question of whether or not there is any evidence in the record which, with legitimate and reasonable inferences therefrom, when viewed in the light most favorable to the plaintiff, tends to prove the material allegations of plaintiff's cause of action under any of the allegations of negligence. Lester v. Bugni, 316 Ill. App. 19; Wolever v. Curtiss Candy Co., 293 Ill. App. 586; Young v Illinois Cent. R. Co., 319 Ill. App. 311. And where uncertainty arises as to inferences that may be legitimately drawn from the evidence so that fair-minded men may honestly draw different conclusions, the question is not one of law but one of fact, to be determined by the jury. Turner v. Cummings, 319 Ill. App. 225, and cases cited therein. It would thus appear that if there is any evidence to substantiate plaintiffs' case, defendant's motion to direct could not properly be allowed, and in this connection the court would not have been justified in considering the cab driver's evidence at all in determining whether defendant's motion for directed verdict should have been granted. From the foregoing summary of the testimony adduced upon the hearing, it is apparent that plaintiffs made a prima facie case and that their evidence, with legitimate and reasonable inferences therefrom, when viewed in the light most favorable to them, tended to prove the

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material allegations of their complaint under the charges of negligence.

It is next urged that because the verdicts are against the manifest weight of the evidence the court should have granted defendant a new trial. In support of this contention it is argued that the cab had reached the center of the intersection when it was struck toward the rear by Bach's automobile, so hard that both vehicles finished up across the street, "and the agency that set that force in motion was foreign to the defendant and in nowise subject to its control." Plaintiffs' witnesses testified to defendant's negligence in respect to the speed of his cab, and his disregard for the warning signs along Park avenue, and he himself stated that he did not touch his brake pedal before entering the intersection, as was his usual custom. Although he saw the "slow" and "danger" signs in the street, he drove right past them. When 50 feet from the intersection he looked to the right, then drove out into the intersection, past the thick tall shrubbery, without taking another glance to his right. The signs on the street should have warned him that he must expect traffic on the intersecting street; nevertheless, he failed to look again after he reached the place where he could have seen. According to all the testimony except his own, his speed was considerably in excess of 22 to 25 miles an hour. It was the function of the jury who heard all the evidence to determine the credibility of the witnesses and determine whether defendant was negligent and whether the negligence of its driver was the proximate cause of the accident, and we would not be justified upon the record presented in disturbing the verdict on the ground that it was against the manifest weight of the evidence.

Defendant further contends that the court erred in giving three instructions requested by plaintiffs. One of these is instruction No. 14 which reads: "If you believe from the evidence, that any witness in this case has knowingly and wilfully sworn

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Defendant further contends that the court erred in giving three instructions requested by plaintiffs. One of these is instruction No. 14 which reads: "If you believe from the evidence, that any witness in this case has knowingly and wilfully sworn

falsely on this trial to any matter material to the issues in this case, as elsewhere defined in these instructions, then you are at liberty to disregard the entire testimony of such witness, except insofar as it has been corroborated - if you find it has been corroborated - by other credible evidence or by facts and circumstances proved on the trial." It is urged that this instruction was improper because, the cab driver being defendant's only fact witness, his testimony could not be corroborated "by other credible evidence from witnesses for the defendant," and the jury would therefore be led to infer that the driver's story could be disregarded. A witness who is impeached is subject to suspicion whether he be the only witness or one of many, and if the cab driver was impeached in any material matter, it was the right of the jury to reject his testimony, even though he was the only occurrence witness for defendant. Moreover, the instruction was not limited to the cab driver; it applied with equal force to plaintiffs' witnesses, as to one of whom defendant offered impeaching testimony. People v. Flynn, 378 Ill. 351, is cited as supporting defendant's contention that this instruction was erroneous. In that case the instruction authorized the jury to disregard the witness' story unless corroborated "by other credible witnesses," and the court merely held that the instruction should have required corroboration by "other credible evidence." The instruction in the case at bar follows the recommendation made in the Flynn case and is not subject to the objection urged. Instruction No. 14 is also criticized because it fails to define what is "material" matter in the cause, and no other instruction assumes to do so. However, given instruction No. 5, offered by plaintiffs, defined the issues at considerable length and advised the jury what was material matter in the cause. In People v. Wells, 380 Ill. 347, the court said that it was undoubtedly the rule "that where this instruction is given [being one similar to instruction No. 14], other instructions should be given de-

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fining the issues, so as not to throw the burden on the jury of ascertaining what are and what are not material issues of fact." The charge to the jury in the case at bar fully complied with that rule.

Another instruction, No. 13, defining the duty owed by a common carrier to a passenger for hire, is criticized as erroneous. This instruction reads: "You are instructed that it is the duty of a common carrier to do all that human care, diligence and foresight can reasonably do, under the circumstances and in view of the character and the mode of conveyance adopted, consistent with the practical prosecution of its business, to guard against accidents and consequential injuries, and if it neglects so to do it is to be held strictly responsible for all consequences which directly and proximately flow from such neglect (provided such neglect and consequence are alleged in the complaint and are proved by a preponderance or greater weight of the evidence); that while the carrier is not an insurer of the absolute safety of the passenger, it does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passenger, under the circumstances and in view of the character and the mode of conveyance adopted, consistent with the practical prosecution of its business, and is responsible for any neglect which directly and proximately causes injury to the passenger (provided such neglect and injury are alleged in the complaint and are established by a preponderance or greater weight of the evidence), if the passenger is at the time of the injury exercising ordinary care for his own safety." Defendant's counsel say that the instruction in the form given "bears down on the theory and thought that the defendant as a common carrier was an 'insurer' of the safety of the passengers carried in defendant's cab, despite a place in the instruction for a more limited liability of the defendant in this regard, which was tucked away in the body

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of this instruction for plaintiff." We think the instruction is free from the criticism made, and in fact it has been approved in practically identical form by courts of review in this state. C. & A. R. R. Co. v. Byrum, 153 Ill. 131; MacDonald v. Chicago Rys. Co., 210 Ill. App. 87; Sczuck v. Chicago Railways Co., 229 Ill. App. 325 (following Chicago City Ry. Co. v. Shaw, 220 Ill. 532). Defendant cites no cases wherein the instruction was criticized or disapproved. Decisions cited by defendant merely hold that the carrier is not an insurer, and instruction No. 13 so advised the jury.

The remaining instruction criticized is No. 11, which reads: "You are instructed that on September 27, 1941, there was in full force, effect and operation a certain statute of the State of Illinois which provided that motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left. You are further instructed that under the provisions of this statute, the driver approaching from the right has the right-of-way over one approaching from the left unless you believe from the evidence that the car on the right was sufficiently far away so that, if being driven with due care, it would not reach the intersection until the car from the left could pass." Defendant does not point out any error in this instruction, but argues that it was not applicable to the facts because the "driver of the westbound car never thought he had a right to rely on a superior right to cross over the intersection, statutory or otherwise." In Riddle v. Mansager, 254 Ill. App. 68, cited by defendant, the court said that "The statute does not authorize such assertion of the right of way regardless of circumstances, distance, or speed." All these elements were given due weight in instruction No. 11, and the jury was told that the driver from the right had the right of way over the driver from the

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left "** unless you believe from the evidence that the car on the right was sufficiently far away so that, if being driven with due care, it would not reach the intersection until the car from the left could pass;" and in deciding which car had the right of way, under the conditions of instruction No. 11, the jury of necessity must have taken into consideration the circumstances, speed and distance. Moreover, it appears from the testimony of the cab driver that he obviously thought he was entitled to the right of way, because he disregarded the warning signs and failed to slow down as he approached the intersection, or at any time preceding the accident.

Lastly it is urged that the verdicts were for excessive amounts and were produced by undue sympathy or prejudice. Hannaher, who was 39 years of age, was thrown from the taxicab to the pavement and rendered unconscious. He was taken to Oak Park Hospital, where he remained for 47 days, part of the time critically ill. His breathing was labored and difficult, and there was evidence of infiltration of air in the tissues and marked crepitus. After some delay because of his serious condition, X-rays were taken showing a pelvic fracture and two broken ribs, which occasioned a puncture of the lung. He suffered a dislocation of the left clavicle and sternum. Because of the lack of oxygen his nails became blue and he was given blood plasma and narcotics. Absolute immobilization, with general supportive treatment, was prescribed, and when he finally recovered sufficiently to be removed to his home he walked with a "waddle" caused by the pain in his pelvis. Although his pelvic condition cleared up completely, he still experienced pains in his chest at the time of the trial, and that condition was described as probably permanent. In October 1942 he entered the army and was assigned to limited noncombat service with the medical corps. His medical expenses exceeded $700, together with a wage loss of $400. Considering his permanent lung

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condition and other serious injuries, the award of $5,000 cannot be held to be excessive.

Mrs. Hannaher was also rendered unconscious by the force of the collision, and her shock was such that she was still unable to recall the facts of the accident at the time of the trial. She recovered consciousness in the Oak Park Hospital late in the night and was suffering severe pain. She had just obtained a new position but was unable to work to any extent because of headaches, nausea and dizziness. Her physician made findings of a hematoma of the scalp, contusions of the middle joint of the middle finger of the left hand, and marked tremor of the hands. Before she was given the usual treatment for cerebral concussion her headaches, dizziness and nervous condition became progressively worse, and accordingly she was hospitalized from October 4 to 12. Upon re-examination her physician observed dizziness, vertigo, instability in walking, and shaking of the hands and tongue, which he attributed to a brain concussion. Her nervous symptoms persisted for about six months, and thereafter largely disappeared except for occasional dizzy spells at night. Her hospital and doctor bills aggregated $165, and she lost about two weeks' work as a demonstrator of home economics, for which she received a salary of $30 a week. We think the award of $1,200 was not at all excessive.

Peggy Hanson was also rendered unconscious by the crash. Her leg and head were cut, two teeth were broken, and she had burns on her forehead and arm. She had no permanent injuries, although she was compelled to stay out of school for a week or two. The jury allowed her $200, which we think was a fair award.

We find no convincing reason for reversal, and therefore the judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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JUDGMENT AFFIRMED.

Boardman and Sullivan, JJ., concur.

42814

322 I.A. 278

FREDRICK W. SEDGWICK,
Appellant,

v.

ROSALIND BARNES SEDGWICK,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff instituted a divorce proceeding in the Superior court against his wife on the ground of adultery, to which she filed a cross-complaint for divorce, charging adultery, desertion and cruelty. The charge of desertion was withdrawn before trial, and at the conclusion of the hearing defendant also withdrew her charge of adultery. Trial by jury resulted in a finding that defendant was guilty of adultery and that plaintiff was not guilty of cruelty. Upon written motion of defendant the court granted a new trial, and thereafter plaintiff filed a petition for leave to appeal from that order, which was granted. Subsequently defendant answered the petition for leave to appeal, and the cause was submitted upon the briefs filed and the oral argument presented by the respective parties.

The trial of the cause extended over a period of two weeks, during which substantially 1000 pages of evidence were introduced. The salient facts disclose that the parties were married in February 1936. As a result of that marriage a child, Fredrick William Sedgwick III was born in March 1940. Mr. Sedgwick was engaged as a stationary engineer by the E. I. Du Pont Company at Elwood, Illinois, but resided in Chicago. Mrs. Sedgwick, after graduating from high school at the age of sixteen, found employment with the Hartford Fire Insurance Company, and continued to work there throughout her married life with the exception of a brief interval in 1940, when her child was born. During their married life the parties

42814

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Appellee.

MR. JUSTICE JUSTICE DELIVERED THE OPINION OF THE COURT.

Plaintiff instituted a divorce proceeding in the Superior court against his wife on the ground of adultery, to which she filed a cross-complaint for divorce, charging adultery, desertion and cruelty. The charge of desertion was withdrawn before trial, and at the conclusion of the hearing defendant also withdrew her charge of adultery. Trial by jury resulted in a finding that defendant was guilty of adultery and that plaintiff was not guilty of cruelty. Upon written motion of defendant the court granted a new trial, and thereafter plaintiff filed a petition for leave to appeal from that order, which was granted. Subsequently defendant answered the petition for leave to appeal, and the cause was submitted upon the briefs filed and the oral argument presented by the respective parties.

The trial of the cause extended over a period of two weeks, during which substantially 1500 pages of evidence were introduced. The salient facts disclose that the parties were married in February 1936. As a result of that marriage a child, Frederick William Sedgwick III was born in March 1940. Mr. Sedgwick was engaged as a stationary engineer by the E. I. Du Pont Company at Elwood, Illinois, but resided in Chicago. Mrs. Sedgwick, after graduating from high school at the age of sixteen, found employment with the Hartford Fire Insurance Company, and continued to work there throughout her married life with the exception of a brief interval in 1940, when her child was born. During their married life the parties

were mutually unhappy and separated in 1938. During the separation plaintiff became acquainted with a Miss White, for whom he developed deep affection. In July 1939 plaintiff learned that his wife was pregnant, and he immediately rented an apartment for her, and they began living together again. At that time he told his wife about Miss White and promised not to see her again. However, the reunion was short-lived and they again became separated after about a month. Following the second separation plaintiff resumed his friendship with Miss White, and in September 1939 bought her a ring which, after his divorce from defendant, he intended to be an engagement ring. In November of that year the parties again became reconciled and lived together until January 1940, when defendant left for Phoenix, Arizona. Miss White left Chicago about the same time, and plaintiff has not seen her since. However, while defendant was in Arizona he wrote Miss White two ardent love letters, in February and March 1940. After the child was born in Phoenix, plaintiff visited defendant and the child in that city. Mrs. Sedgwick returned to Chicago in May 1940, where she again commenced to reside with her husband. Some two months later she found the letters which plaintiff had written to Miss White during her absence, together with the receipt for the ring he had purchased and given to Miss White, and she talked to the plaintiff about them. Nevertheless, the parties continued to live together for approximately a year, when defendant again left her husband and went to live at her brother's home. Plaintiff saw her from time to time and paid her the sum of $50 a month for the child's support, according to an agreement between them. Their relationship continued friendly and in June 1941 she took a trip with her husband to New York, where they remained about two days. In September 1941 defendant and her child commenced to reside with a Mrs. Maxine Jansen and her two children, aged eleven and eight, at 303 Englewood avenue,

were mutually unhappy and separated in 1938. During the separation plaintiff became acquainted with a Miss White, for whom he developed deep affection. In July 1939 plaintiff learned that his wife was pregnant, and he immediately rented an apartment for her, and they began living together again. At that time he told his wife about Miss White and promised not to see her again. However, the reunion was short-lived and they again became separated after about a month. Following the second separation plaintiff resumed his friendship with Miss White, and in September 1939 bought her a ring which, after his divorce from defendant, he intended to be an engagement ring. In November of that year the parties again became reconciled and lived together until January 1940, when defendant left for Phoenix, Arizona. Miss White left Chicago about the same time, and plaintiff has not seen her since. However, while defendant was in Arizona he wrote Miss White two ardent love letters, in February and March 1940. After the child was born in Phoenix, plaintiff visited defendant and the child in that city. Mrs. Hedgwick returned to Chicago in May 1940, where she again commenced to reside with her husband. Some two months later she found the letters which plaintiff had written to Miss White during her absence, together with the receipt for the ring he had purchased and given to Miss White, and she talked to the plaintiff about them. Nevertheless, the parties continued to live together for approximately a year, when defendant again left her husband and went to live at her brother's home. Plaintiff saw her from time to time and paid her the sum of $50 a month for the child's support, according to an agreement between them. Their relationship continued friendly and in June 1941 she took a trip with her husband to New York, where they remained about two days. In September 1941 defendant and her child commenced to reside with a Mrs. Maxine Jensen and her two children, aged eleven and eight, at 301 Englewood avenue,

Chicago. Mrs. Jansen was then separated from her husband. Plaintiff continued to visit his child once or twice a week and to pay defendant the monthly support for the child. Prior to living with Mrs. Jansen, defendant became acquainted with one Frank McDonald, who took up residence in an apartment near the Jansen home. Before separating from her husband, Mrs. Jansen had frequented a liquor store in the neighborhood where Bernie Chinsky was manager, and after her separation, when defendant moved into her apartment, there developed a close friendship between defendant, McDonald, Mrs. Jansen and Chinsky which continued until March 1942. During that time Mrs. Sedgwick retained her position with the Hartford Fire Insurance Company, and after returning from work frequently saw McDonald at the liquor store and in the Jansen apartment, where Chinsky was also a frequent visitor. While visiting his child at the Jansen apartment plaintiff met McDonald on several occasions. Ultimately he retained the Hargrave Secret Service Agency to keep his wife and her companions under observation, and the evidence discloses that he spent considerable sums in securing the evidence upon which his charge of adultery is predicated. Hargrave's operatives were constantly present around the Jansen apartment and plaintiff accompanied them most of the time. They and Mr. Jansen testified that defendant and McDonald frequented Chinsky's liquor store, drank and embraced each other and then retired to the Jansen apartment, either together or separately, where McDonald remained for considerable periods of time, with the curtains drawn and the apartment in darkness, and that Chinsky also frequently visited Mrs. Jansen while McDonald was there. Defendant says she was aware of the constant presence of detectives in the neighborhood and that she drew the curtains and extinguished the lights so that she could watch them unobserved. Finally toward the end of March 1942 Hargrave, with several of his

Chicago. Mrs. Jansen was then separated from her husband. Plaintiff continued to visit his child once or twice a week and to pay defendant the monthly support for the child. Prior to living with Mrs. Jansen, defendant became acquainted with one Frank McDonald, who took up residence in an apartment near the Jansen home. Before separating from her husband, Mrs. Jansen had frequented a liquor store in the neighborhood where Bernie Chinsky was manager, and after her separation, when defendant moved into her apartment, there developed a close friendship between defendant, McDonald, Mrs. Jansen and Chinsky which continued until March 1942. During that time Mrs. Sedgwick retained her position with the Hartford Fire Insurance Company, and after returning from work frequently saw McDonald at the liquor store and in the Jansen apartment, where Chinsky was also a frequent visitor. While visiting his child at the Jansen apartment plaintiff met McDonald on several occasions. Ultimately he retained the Hargrave Secret Service Agency to keep his wife and her companions under observation, and the evidence discloses that he spent considerable sums in securing the evidence upon which his charge of adultery is predicated. Hargrave's operatives were constantly present around the Jansen apartment and plaintiff accompanied them most of the time. They and Mr. Jansen testified that defendant and McDonald frequented Chinsky's liquor store, drank and embraced each other and then retired to the Jansen apartment, either together or separately, where McDonald remained for considerable periods of time, with the curtains drawn and the apartment in darkness, and that Chinsky also frequently visited Mrs. Jansen while McDonald was there. Defendant says she was aware of the constant presence of detectives in the neighborhood and that she drew the curtains and extinguished the lights so that she could watch them unobserved. Finally toward the end of March 1942 Hargrave, with several of his

men, accompanied by plaintiff and his friend Christiansen, raided the apartment shortly before two in the morning and found defendant, Mrs. Jansen, Chinsky and McDonald there in night attire. Plaintiff asserts that the evidence adduced by him leads clearly to the conclusion that his wife committed adultery with McDonald. On the other hand, she and McDonald, while admitting that they were friendly, saw each other frequently, attended movies and dined together, in the apartment and elsewhere, both vehemently denied that they had committed adultery at any time. Considerable ill feeling was exhibited between the parties during the trial, which was marked by mutual recriminations and the average amount of perjury in cases of this character. Defendant's counsel insist that the verdict resulted from the prejudicial evidence adduced by plaintiff and passion engendered in the minds of the jurors as a result thereof.

Plaintiff's petition for leave to appeal from the order granting a new trial is predicated solely on the contention that the new trial was allowed by the judge upon the erroneous theory of law that plaintiff, by reason of his relations with Miss White and his conduct and attitude toward defendant as the result of that relationship, did not come into court with clean hands, and that the court erroneously relied upon Grady v. Grady, 266 Ill. App. 277, as the basis for the order entered. It appears from the record that after verdict an argument took place before the court over the request of defendant for the allowance to her of attorney's fees *pendente lite* and suit money. That particular application was never disposed of, but in the course of the argument counsel for defendant cited the Grady case. At that time the judge did not have the motion for a new trial before him; it had been set for a subsequent date, but it was not intended that the Grady case should be the basis of a motion for a new trial.

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It was rather argued by defendant's counsel that even if the verdict should stand, still the Grady case might indicate a ground for denying a divorce. The judge finally deferred any ruling on the motion for attorney's fees and suit money until the final determination of the other matters. Thereafter arguments were made on the motion filed by defendant for a judgment or decree non obstante veredicto, and that motion was overruled. The motion for a new trial was then presented and ordered filed, and argument proceeded thereon. The specific written grounds urged for a new trial were (1) that the verdict was manifestly against the weight of the evidence; (2) that it resulted from passion or prejudice and without due and proper consideration of the law and evidence; (3) that the court erred in the admission of prejudicial evidence which did not tend to prove any of the issues, but only prejudiced the minds of the jurors against defendant; (4) that the court permitted improper cross-examination of defendant's witnesses on matters not covered by direct examination; (5) that the court allowed testimony purporting to impeach defendant's witnesses on immaterial matters; and (6) that error was committed in improperly charging the jury. The doctrine of "unclean hands" was not invoked as a ground for the motion. In their argument on the motion for a new trial the respective counsel reviewed the evidence and discussed the purported errors assigned in support of the motion; ~~and at one stage of the argument the court expressed the opinion that "there is no evidence of adulterous relations"~~ the judge alluded to the Grady case, and at one point posed the inquiry: "Is there any such principle as the plaintiff coming into equity with clean hands in a divorce suit?" Neither of the counsel responded to that question and counsel then proceeded to argue the question whether Mrs. Sedgwick had condoned the several acts of cruelty to which she had testified. When the argument was concluded the judge ordered a short recess,

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retired to his chambers, and when court was again convened he announced that the motion for a new trial would be allowed.

Plaintiff's counsel argue that the court allowed the motion on the erroneous theory that plaintiff did not come into court with clean hands. A careful examination of the record, including the argument of counsel on the motion for a new trial, does not sustain plaintiff's position. Although the court may have had that theory in mind in considering the evidence, including that of plaintiff's conduct with Miss White and his entering into an engagement with her while he was still living with Mrs. Sedgwick and continuing that relationship up to the time the child was born, the record does not warrant the assumption that the motion for a new trial was granted upon that theory. There were questions as to the manifest weight of the evidence, the degree of proof required to support the charges of adultery, assignments of error relating to the improper examination of witnesses and of prejudicial testimony introduced by plaintiff, and as to instructions given. The court may have considered one or a number of the grounds urged as cogent reasons for allowing a new trial; or he may have believed that the verdict was produced through prejudice or passion and did not fairly reflect the evidence adduced upon the hearing. ~~His stated opinion that there was no evidence of adulterous relations indicates that he could not enter judgment on the verdict.~~

In granting a new trial the judge has more latitude than the reviewing court in passing upon the verdict of a jury, and the allowance or refusal of a new trial is peculiarly within his discretion (Gavin v. Keter, 278 Ill. App. 308), since there are many things which he observes that do not appear from the printed record. (Gavin v. Keter, supra; Couch v. Southern Ry. Co., 294 Ill. App. 490.) It is only when he abuses his discretion in granting the motion for a new trial that the reviewing court is justified in allowing leave to appeal.

retired to his chambers, and when court was again convened he announced that the motion for a new trial would be allowed.

Plaintiff's counsel argue that the court allowed the motion on the erroneous theory that plaintiff did not come into court with clean hands. A careful examination of the record, including the argument of counsel on the motion for a new trial, does not sustain plaintiff's position. Although the court may have had that theory in mind in considering the evidence, including that of plaintiff's contract with Miss Tuite and his entering into an engagement with her while he was still living with Mrs. Hodgkin and continuing that relationship up to the time the child was born, the record does not warrant the assumption that the motion for a new trial was granted upon that theory. There are questions as to the heaviest weight of the evidence, the degree of proof required to support the charges of adultery, assignments of error relating to the improper examination of witnesses and of prejudicial testimony introduced by plaintiff, and as to instructions given. The court may have considered one or a number of the grounds urged as cogent reasons for allowing a new trial; or he may have believed that the verdict was procured through prejudice or passion and did not fairly reflect the evidence adduced upon the hearing. ~~[illegible]~~

In granting a new trial the judge has more latitude than the reviewing court in pitting upon the verdict of a jury, and the allowance or refusal of a new trial is peculiarly within his discretion (Davin v. Keter, 273 Ill. App. 308); since there are many things which he observes that do not appear from the printed record. (Davin v. Keter, supra; Dowd v. Southern Ry. Co., 294 Ill. App. 490.) It is only when he abuses his discretion in granting the motion for a new trial that the reviewing court is justified in allowing leave to appeal.

From his knowledge of the case and the evidence presented, the court was undoubtedly of the opinion that justice would be better served by a retrial of the cause and we would not be warranted in holding that he abused his discretion in granting the motion for a new trial. The order is therefore affirmed.

ORDER GRANTING NEW TRIAL AFFIRMED.

Scanlan and Sullivan, JJ., concur.

42824

ETHEL DOWLING, WILLIAM H. KLEMP, and FRED C. KLEMP,

Appellees,

v.

ARTHUR E. SANGDAHL and W. FORREST OGLE,

Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

386 108

322 I.A. 279

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On November 27, 1941 Ethel Dowling and William H. Klemp brought suit against Arthur E. Sangdahl, W. Forrest Ogle and Fred C. Klemp for an unpaid balance of $6400 (and interest thereon) of the purchase price of 95 shares of the common capital stock of William F. Klemp Company, a corporation, which was sold by Mary C. Klemp, the mother of plaintiffs, to Sangdahl and Ogle by written contract dated October 28, 1927, for $9500, payable in installments over a ten-year period with interest at 6 per cent per annum. Before the entry of judgment the complaint was amended by leave of court so as to join Fred C. Klemp as one of the plaintiffs instead of as defendant. The cause was tried by the court without a jury upon a stipulation as to the facts, and finding and judgment were entered against defendants for the full amount of plaintiffs' claim, $10,612.45. After entry of judgment the trial judge prepared and ordered made part of the record his statement in writing setting forth his conclusions and the reasons therefor. Defendants have taken an appeal from the judgment entered.

The salient facts disclose that William F. Klemp, an officer of the William F. Klemp Company, died in 1924, leaving him surviving his widow, Mary C. Klemp, and his three children, the plaintiffs in this case. In his will he designated the State Bank of Chicago as executor and his widow as his sole beneficiary. At the time of his death he owned 345 shares of stock in the William F. Klemp Company. Sangdahl and Ogle, employees of the corporation, desired to purchase on the installment plan the shares owned by

ETHEL DOELING, WILLIAM F. KLEMP,
and FRED C. KLEMP,

Appellees,

v.

ARTHUR E. MANNHEIMER and W. ROBERT VOGEL,

Appellants.

Mr. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On November 27, 1941 ethel Doeling and William F. Klemp brought suit against Arthur E. Mannheim, W. Robert Vogel and Fred C. Klemp for an unpaid balance of $2400 (and interest thereon) of the purchase price of 25 shares of the common capital stock of William F. Klemp Company, a corporation, which was sold by Mary C. Klemp, the mother of plaintiffs, to Mannheim and Vogel by written contract dated October 28, 1927, for $7500, payable in installments over a ten-year period with interest at 6 per cent per annum. Before the entry of judgment the complaint was amended by leave of court so as to join Fred C. Klemp as one of the plaintiffs instead of as defendant. The cause was tried by the court without a jury upon a stipulation as to the facts, and finding and judgment were entered against defendants for the full amount of plaintiffs' claim, $10,812.44. After entry of judgment the trial judge prepared and ordered made part of the record his statement in writing setting forth his conclusions and the reasons therefor. Defendants have taken an appeal from the judgment entered.

The salient facts disclose that William F. Klemp, an officer of the William F. Klemp Company, died in 1924, leaving his surviving his widow, Mary C. Klemp, and his three children, the plaintiffs in this case. In his will he designated the State Bank of Chicago as executor and his widow as his sole beneficiary. At the time of his death he owned 245 shares of stock in the William F. Klemp Company. Mannheim and Vogel, employees of the corporation, desired to purchase on the installment plan the shares owned by

William F. Klemp in order to get control of the corporation, and accordingly they entered into a contract in writing, dated October 28, 1924, with the State Bank of Chicago as executor, wherein they agreed to pay the sum of $25,000 with interest, upon the installment plan, for 250 shares. That agreement contained an option giving defendants the right to buy from Mrs. Klemp within three years the remaining 95 shares. The contract for the purchase of 250 shares was fully consummated and the stock was paid for by defendants and delivered to them. No controversy exists with respect to that transaction.

Subsequently on October 28, 1927 Mrs. Klemp sold to defendants the remaining 95 shares of the common capital stock on which they had an option. The contract was in writing and provided for installment payments aggregating $9500 over a ten-year period, plus interest at 6 per cent per annum. It also provided that a certificate of stock evidencing the shares should, simultaneously with the execution of the agreement, be transferred to the defendants, who should endorse the certificate in blank and deliver it to the State Bank of Chicago, which was to hold it pursuant to the terms of the agreement; and upon the completion of payments the bank should redeliver the certificate to the purchasers or their nominees. In the absence of default of payment the purchasers were to be entitled to all dividends and to vote the stock. The contract contained the further provision that "In case of the failure of the said purchasers to make either the payments or any part thereof or interest thereon, or perform any of the covenants on their part hereby made and entered into, this contract shall, at the option of the seller, be forfeited and determined, and the purchasers shall forfeit all payments made by them on this contract and such payments shall be retained by the seller in full satisfaction and in liquidation of all damages by her sustained, and the seller

William E. Ilsen in order to get control of the corporation, but accordingly they entered into a contract in writing, dated October 26, 1924, with the State Bank of Chicago as trustee, wherein they agreed to pay the sum of $15,000 with interest, upon the installment plan, for 200 shares. That agreement contained an option giving defendants the right to buy free 200 shares within three years the remaining 50 shares. The contract for the purchase of 200 shares was fully consummated and the trustee was paid for by defendants and delivered to them. No controversy exists with respect to that transaction.

Subsequently on October 28, 1927 the plaintiff in defendants the remaining 50 shares of the common capital stock on which they had an option. The contract was in writing and provides for installment payments covering about a ten-year period, plus interest at 6 per cent per annum. It also provides that a certificate of stock evidencing the shares should, simultaneously with the execution of the agreement, be transferred to the defendants, who should endorse the certificate in blank and deliver it to the State Bank of Chicago, which was to hold it pursuant to the terms of the agreement; and upon the completion of payments the bank should transfer the certificate to the purchasers or their nominees. In the absence of default of payment the purchasers were to be entitled to all dividends and to vote the stock. The contract contained the further provision that "In case of the failure of the said purchasers to make either the payments or any part thereof or interest thereon, or perform any of the covenants on their part hereby made and entered into, this contract shall, at the option of the seller, be forfeited and determined, and the purchasers shall forfeit all payments made by them on this contract and such payments shall be retained by the seller in full satisfaction and in liquidation of all damages by her sustained, and the seller

shall have the right thereupon, or at any time or times thereafter, on thirty days' notice to the purchasers or either of them, to sell said shares of stock or any part thereof at any brokers' board or at public or private sale, and may apply the net proceeds, after deducting all costs and expenses for collection, sale and delivery, to the payment of said nine thousand five hundred dollars ($9,500), provided, however, that should the net proceeds of said sale and any monies paid hereunder, not including interest, exceed the sum of nine thousand five hundred dollars ($9,500) and interest thereon, the overplus shall be paid to the purchasers. It is understood that upon any sale of any of said shares the said Mary C. Klemp may become the purchaser thereof, and hold the same thereafter in her own right, absolutely free from any claim or right of redemption of the purchasers."

Simultaneously with the execution of the contract the certificate for 95 shares of stock was taken from the files of the State Bank of Chicago, in whose possession it had been until then, and transferred on the books of the William F. Klemp Company to the defendants Sangdahl and Ogle, and a new certificate for 95 shares, dated October 28, 1927, was issued by the corporation in their names. Defendants thereupon endorsed the certificate in blank and delivered it to the State Bank of Chicago, together with a duplicate original of the agreement between them and Mary C. Klemp. An employee of the trust department of the bank endorsed on the agreement the legend "Escrow 4271." During the lifetime of Mary C. Klemp defendants paid to her on account of principal the sum of $3100 and all accrued interest up to April 1, 1932, but payments then ceased and repeated demands for the balance by Mrs. Klemp up to the time of her death and of plaintiffs thereafter, were unavailing.

The State Bank of Chicago became consolidated with the

shall have the right thereupon, or at any time or times thereafter, on thirty days' notice to the purchasers or owners of them, to sell said shares of stock or any part thereof on any brokers' board or at public or private sale, and apply the net proceeds, after deducting all costs and expenses for collection, sale and delivery, to the payment of said nine thousand five hundred dollars ($9,500), provided, however, that should the net proceeds of said sale and any monies paid hereunder, not including interest, exceed the sum of nine thousand five hundred dollars ($9,500) and interest thereon, the excess shall be paid to the purchasers. It is understood that upon any sale of any of said shares the said Mary C. Kemp may become the purchaser thereof, and hold the same thereafter in her own right, absolutely free from any claim or right of redemption of the purchaser."

Simultaneously with the execution of the contract the certificate for 95 shares of stock was taken from the files of the State Bank of Chicago, in whose possession it had been until then, and transferred on the books of the William F. Kemp Company to the defendants Langdon and Ogle, and a new certificate for 95 shares, dated October 28, 1927, was issued by the corporation in their names. Defendants thereupon endorsed the certificate in blank and delivered it to the State Bank of Chicago, together with a duplicate original of the agreement between them and Mary C. Kemp. An employee of the trust department of the bank endorsed on the agreement the legend "Escrow copy." During the lifetime of Mary C. Kemp defendants paid to her an amount of principal the sum of $2100 and all accrued interest up to April 1, 1929, but payments then ceased and repeated demands for the balance by Mrs. Kemp up to the time of her death and of plaintiffs thereafter, were unavailing.

The State Bank of Chicago became consolidated with the

Foreman State Trust and Savings Bank which, by succeeding to the business of the two consolidated banks, came into possession of the certificate of stock and the agreement attached thereto. After the Foreman State Bank was taken over by Charles H. Albers as receiver he sent a letter to Mrs. Klemp on September 18, 1933 which reads as follows: "Re: Escrow 4271. Will you kindly arrange to withdraw the securities in the above escrow as promptly as possible, as it is necessary that these securities be disposed of before the Receiver's Final Account is filed." Receiving no response, Albers wrote her another letter on January 15, 1934 of similar import. Pursuant to these requests Mrs. Klemp went to the bank, received the contract and certificate of stock, and executed a receipt for them. This was done without notice to Sangdahl and Ogle, and they did not discover it until May 28, 1941. During all that time Sangdahl and Ogle voted the stock and Mrs. Klemp, up to the time of her death, continued to make demands for payments. Soon after the death of Mrs. Klemp on April 30, 1936, Ethel Dowling was appointed administratrix of her estate. Her original inventory was filed December 9, 1936. By supplemental inventory of June 19, 1940 she listed the claim against defendants predicated upon the unpaid balance due for the sale of 95 shares of stock, and that claim was ultimately assigned to plaintiffs as owners in common as part of the distribution of the assets of the estate. During the pendency of the estate in the Probate court no effort was made to collect the claim and no communication was had with defendants until January 6, 1941, when plaintiffs' attorney wrote a letter to defendants concerning the matter. Thereafter in May 1941 defendants first learned of the acquisition in 1934 of the certificate of stock by Mrs. Klemp. They denied liability for the unpaid balance and disclaimed ownership of the stock.

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After the Foreman State Bank was taken over by Charles H. Albers as receiver he sent a letter to Mrs. Klemp on December 18, 1932 which reads as follows: "Re: Docket 4271. Will you kindly arrange to withdraw the securities in the above docket as promptly as possible, as it is necessary that these securities be disposed of before the Receiver's final account is filed." Receiving no response, Albers wrote her another letter on January 17, 1934 of similar import. Pursuant to these requests Mrs. Klemp sent to the bank, received the contract and certificate of stock, and executed a receipt for them. This was done without notice to Bangham and Ogle, and they did not discover it until May 26, 1941. During all that time Bangham and Ogle voted the stock and Mrs. Klemp, up to the time of her death, continued to make demands for payments. Soon after the death of Mrs. Klemp on April 30, 1936, Ethel Dowling was appointed administratrix of her estate. Her original inventory was filed December 4, 1936. By supplemental inventory of June 19, 1940 she listed the claim against defendants predicated upon the unpaid balance due for the sale of 95 shares of stock, and that claim was ultimately assigned to plaintiffs as owners in common as part of the distribution of the assets of the estate. During the pendency of the estate in the Probate court no effort was made to collect the claim and no communication was had with defendants until January 6, 1941, when plaintiffs' attorney wrote a letter to defendants concerning the matter. Thereafter in May 1941 defendants first learned of the cancellation in 1934 of the certificate of stock by Mrs. Klemp. They denied liability for the unpaid balance and disclaimed ownership of the stock.

Defendants take the position that the bank was an escrowee, holding the certificate of stock "pursuant to the terms of the agreement"; that when Mrs. Klemp took the stock certificate out of the custody and possession of the bank in February 1934 she exercised her option to forfeit and determine the agreement, by reason whereof the payments theretofore made on account of the purchase price became forfeited and were retained by her in full settlement and liquidation of all damages. They emphasize the fact that they were not apprised of the acquisition of the certificate until long after it was delivered to Mrs. Klemp, that no action was taken by her to collect the balance of the purchase price prior to her death, and that the administratrix made no effort to collect nor to inventory the chose in action until June 1940; and their counsel argues that these circumstances indicate an intention on her part to forfeit the agreement in 1934 and retain the amounts theretofore paid on account of the purchase as liquidated damages. The difficulty with defendants' theory is that it does not conform to the pleadings or the stipulated facts. Their answer does not allege that any notice of forfeiture was ever given by Mrs. Klemp, but on the contrary states that both Mrs. Klemp, and after her death the plaintiffs, continued to demand payments on the contract, that defendants continued to promise to make payments and to vote as their own the stock on the corporate records, and made no inquiries concerning the whereabouts of the certificate, although a receiver had been appointed for the bank. The numerous letters attached as exhibits to the stipulation of facts show the constant demands made upon defendants, and Mrs. Klemp's course of action before her death, and that of plaintiffs' thereafter, were inconsistent with any theory of forfeiture.

Defendants take the position that the bank was an innocent, holding the certificate of stock "pursuant to the terms of the agreement"; that when Mrs. Kinney took the stock certificate out of the custody and possession of the bank in February 1924 she violated her option to forfeit and determine the agreement, by reason whereof the payments theretofore made on account of the purchase price became forfeited and were retained by her in full settlement and liquidation of all damages. They emphasize the fact that they were not apprised of the cancellation of the certificate until long after it was delivered to Mrs. Kinney, that no action was taken by her to collect the balance of the purchase price prior to her death, and that the administratrix made no effort to collect nor to inventory the chose in action until June 1940; and their counsel argues that these circumstances indicate an intention on her part to forfeit the agreement in 1924 and retain the amounts theretofore paid on account of the purchase as liquidated damages. The difficulty with defendants' theory is that it does not conform to the decisions or the established facts. Their answer does not allege that any notice of forfeiture was ever given by Mrs. Kinney, but on the contrary states that both Mrs. Kinney, and after her death the plaintiff, continued to demand payments on the contract. Most defendants continued to promise to make payments and to retain their own the stock on the corporate records, and made an inquiries concerning the whereabouts of the certificate, although a duplicate had been issued for the bank. The numerous letters evidence an exhibit to the stipulation of facts show the contract frequently made upon defendants, and Mrs. Kinney's course of action before her death, and that of plaintiffs' thereafter, were inconsistent with any theory of forfeiture.

In a carefully considered opinion reciting the essential facts, Judge Fisher, who heard the cause, reached the conclusion that defendants had no possible defense to plaintiffs' cause of action. After reviewing the stipulated facts and detailing the reasons which prompted him to find for plaintiffs, the court summarized his conclusions as follows:

> "1. That no forfeiture of the contract was attempted or intended at any time, by anyone having the right to forfeit.
>
> "2. That no attempt to forfeit would have been availing, because there was nothing to forfeit, since the contract was fully executed and nothing remained to be done, except the payment of the purchase price, which in no way conditioned the execution of the contract or the passing of the title to the stock, since payments, by the very terms of the contract, were deferred to future dates.
>
> "3. That the contract made no provision for forfeiture and the re-delivery of the certificate of stock to the Bank did not invest it with title thereto, nor did the taking of the certificate and agreement by Mary C. Klemp from the Receiver of the Bank re-invest her with any title in the stock, but, on the contrary, she continued to hold it as additional security for the payment of the money due, with the power to sell it in accordance with the terms of the contract, and that she never did.
>
> "4. That the provision in the contract, that any surplus remaining in her hands after sale and payment to herself of the amount due was the property of the purchasers, confirms the finding that there was not, nor could there have been, a forfeiture.
>
> "5. That the provision in the contract that in the event of a sale, Mary C. Klemp may become the purchaser, further confirms the finding that no forfeiture was intended by the parties, for if a forfeiture were intended, she would, by perfecting a legal forfeiture, become the owner of the stock."

We think the court's conclusions are reasonable and sound. The written agreement provided for the actual sale, transfer and delivery to the defendants of a certificate for 95 shares, the cancelation of the certificate by the William F. Klemp Company, the issuance by the company of a new certificate to the defendants in their own names, the promise by defendants to pay for the 95 shares on the installment plan over a period of ten years, without any right in Mrs. Klemp to declare any acceleration of payments in case of default or any provision that time shall be of the essence of

In a carefully considered opinion resolving the essential facts, Judge Fisher, who heard the case, reached the conclusion that defendants had no possible defense to plaintiff's cause of action. After reviewing the stipulated facts and detailing the reasons which prompted him to find for plaintiffs, the court summarized his conclusions as follows:

"1. That no forfeiture of the contract was stipulated or intended at any time, by anyone having the right to forfeit.

"2. That no attempt to forfeit would have been availing, because there was nothing to forfeit, since the contract was fully executed and nothing remained to be done, except the payment of the purchase price, which is no way conditioned the execution of the contract or the passing of the title to the stock, since payments, by the very terms of the contract, were deferred to future dates.

"3. That the contract made no provision for forfeiture and the re-delivery of the certificate of stock to the bank did not invest it with title thereto, nor did the taking of the certificate and agreement by Mary G. Klamp from the receiver of the bank re-invest her with any title in the stock, but, on the contrary, she continued to hold it as additional security for the payment of the money due, with the power to sell it in accordance with the terms of the contract, and that she never did.

"4. That the provision in the contract, that any surplus remaining in her hands after sale and payment to herself of the amount due was the property of the purchaser, confirms the finding that there was not, nor could there have been, a forfeiture.

"5. That the provision in the contract that in the event of a sale, Mary G. Klamp may become the purchaser, further confirms the finding that no forfeiture was intended by the parties, for if a forfeiture were intended, she would, by perfecting a legal forfeiture, become the owner of the stock."

We think the court's conclusions are reasonable and sound. The written agreement provided for the actual sale, transfer and delivery to the defendants of a certificate for 80 shares, the cancellation of the certificate by the affiant G. Klamp, the issuance by the company of a new certificate to the defendants in their own name, the pledge by defendants to Mary for the 80 shares on the installment plan over a period of ten years, without any right in Mrs. Klamp to declare any acceleration of payments in case of default or any provision that time shall be of the essence of

the agreement, and the deposit of the new certificate in the names of the defendants, with the bank only as security for the keeping of defendants' promise to pay. There was no provision authorizing the bank to collect or determine whether defendants were in default or to deliver title to the certificate as escrowee or otherwise, in case of default, to Mrs. Klemp. All these circumstances indicate that the undertaking constituted an executed contract of sale to the defendants and not an executory sales agreement reserving title to the stock in the seller.

The fact that no action was taken against defendants while Mrs. Klemp lived, or during the pendency of the probate proceedings, does not affect the rights of the parties. Defendants were not misled and the contract gave no right to accelerate future payments because of defaults. Both Mrs. Klemp and plaintiffs after her death always treated the contract as an executed agreement and never did anything that could fairly be construed as a wrongful conversion or a declaration of forfeiture. The stipulated facts and exhibits are not susceptible of any other interpretation. Neither Mrs. Klemp nor her children ever treated the stock as their own, and even as late as the trial, tender of the stock certificate to defendants was made, showing that there had been no conversion thereof.

We are of opinion that the court properly interpreted the contract in the light of the stipulated facts, and therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Scanlan, JJ., concur.

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The fact that no action was taken against defendants while Mrs. Klemp lived, or during the pendency of the probate proceedings, does not affect the rights of the parties. Defendants were not misled and the contract gave no right to accelerate future payments because of default. Both Mr. Klemp and plaintiffs after her death always treated the contract as an executed agreement and never did anything that could fairly be construed as a wrongful conversion or a declaration of forfeiture. The stipulated facts and exhibits are not susceptible of any other interpretation. Neither Mrs. Klemp nor her children ever treated the stock as their own, and even as late as the trial, tender of the stock certificate to defendants was made, showing that there had been no conversion thereof.

We are of opinion that the court properly interpreted the contract in the light of the stipulated facts, and therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Conlan, JJ., concur.

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322 I.A. 280

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PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

WESLEY J. MOORE,
Plaintiff in Error.

) ERROR TO MUNICIPAL
) COURT OF CHICAGO.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In an information filed in the Municipal court on February 15, 1943 defendant was charged with obtaining currency by means of a false and bogus check, in violation of paragraph 253, chapter 38 of the Illinois Revised Statutes 1937, which provides: "Whoever, with intent to cheat or defraud another, designedly by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property or other valuable thing, shall be fined in any sum not exceeding $2,000, and imprisoned not exceeding one year, ***." (Italics ours.) Omitting the formal parts, the information reads: "Unlawfully, intentionally and maliciously, did then and there, unlawfully and wilfully obtain from the Grand-State Currency Exchange, same then and there being a corporation, incorporated under the laws of the State of Illinois the sum of ($28.00) dollars currency the lawful money of the United States of America by the means of a false and bogus check, in violation of Paragraph 253, Chapter 38 Illinois Revised Statutes, 1937." When arraigned on March 8, 1943, defendant pleaded guilty and pursuant to trial was ordered committed to a term of one year at labor in the House of Correction and to pay a fine of $500 and costs. After serving eight months of the sentence he was released on a supersedeas bond November 8, 1943.

As the principal ground for reversal it is urged that the "information attempting to charge the statutory

322LA 280

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error, ) Error to Municipal
) Court of Chicago.
v. )
WALLY J. COPE,
Plaintiff in Error. )

Mr. PRESIDING JUSTICE FULTON DELIVERED THE OPINION OF THE COURT.

In an information filed in the Municipal Court on February 12, 1943 defendant was charged with obtaining currency by means of a false and bogus check, in violation of paragraph 253, chapter 38 of the Illinois Revised Statutes 1937, which provides: "Whoever, with intent to cheat or defraud another, designedly by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property or other valuable thing, shall be fined in any sum not exceeding $2,000, and imprisoned not exceeding one year, ***." (Italics ours.) Omitting the formal parts, the information reads: "Unlawfully, intentionally and maliciously, did then and there, unlawfully and wrongfully obtain from the Grand-State Currency Exchange, then and there being a corporation, incorporated under the laws of the state of Illinois the sum of ($28.00) dollars currency the lawful money of the United States of America by the means of a false and bogus check, in violation of Paragraph 253, Chapter 38 Illinois Revised Statutes, 1937." When arraigned on March 6, 1943, defendant pleaded guilty and pursuant to trial was ordered committed to a term of one year at Labor in the House of Correction and to pay a fine of $500 and costs. After serving eight months of the sentence he was released on a supersedeas bond November 8, 1943.

As the principal ground for reversal it is urged that the "information attempting to charge the statutory

offense under the Act of March 27, 1874, and omitting to allege that the act was done with intent to cheat or defraud, charges no offense under the law of the State of Illinois, and a judgment of conviction rendered upon such information is void for want of jurisdiction of the subject matter" and should therefore be reversed without remanding.

The gravamen of the argument is that the information fails to use the statutory words "with intent to cheat or defraud," which create the offense, or words equivalent to that phrase included in the definition of the crime. The contention is a meritorious one and has been frequently sustained by the Appellate court under similar circumstances. In People v. Cohen, 147 Ill. App. 393, the court reversed, without remanding, a judgment based upon an information which attempted to charge the defendant with an offense under the same statute. The information failed to contain the phrase "with intent to cheat or defraud," and it was held that no crime was charged and therefore no lawful conviction could be had under an information which failed to allege the necessary and essential element of the crime. The court said: "The information does not charge that the false pretenses were made 'with intent to cheat and defraud.' This was an essential element to constitute the crime under the statute. It was not waived by pleading and proceeding to trial. *** There could be no lawful conviction under the information, which was fatally defective in failing to aver that the representations were made 'with intent to cheat and defraud.' The statute makes such averment necessary, and lacking it, no crime known to the law was stated as violated by defendant. *** The same precision is as essential to an information as an indictment."

Later, in People v. Kaung, 286 Ill. App. 615, Gen. No. 38643, not published, defendant was found guilty of obtaining money by false pretenses upon an information which

offense under the Act of March 27, 1874, and omitting to allege that the act was done with intent to cheat or defraud, charges no offense under the law of the State of Illinois, and a judgment of conviction rendered upon such information is void for want of jurisdiction of the subject matter, and should therefore be reversed without remanding.

The gravamen of the argument is that the information fails to use the statutory words "with intent to cheat or defraud," which create the offense, or words equivalent to that phrase included in the definition of the crime. The contention is a meritorious one and has been frequently sustained by the Appellate court under similar circumstances. In People v. Cohen, 147 Ill. App. 393, the court reversed, without remanding, a judgment based upon an information which attempted to charge the defendant with an offense under the same statute. The information failed to contain the phrase "with intent to cheat or defraud," and it was held that no crime was charged and therefore no lawful conviction could be had under an information which failed to allege the necessary and essential element of the crime. The court said: "The information does not charge that the false pretenses were made 'with intent to cheat and defraud.' This was an essential element to constitute the crime under the statute. It was not waived by pleading and proceeding to trial. *** There could be no lawful conviction under the information, which was fatally defective in failing to aver that the representations were made 'with intent to cheat and defraud.' The statute makes such averment necessary, and leaving it, no crime known to the law was stated as violated by defendant. *** The same precision is as essential to an information as an indictment."

Later, in People v. Kaung, 286 Ill. App. 615, (Gen. No. 38643), not published, defendant was found guilty of obtaining money by false pretenses upon an information which

likewise failed to charge that the money was obtained "with intent to cheat or defraud." It was there argued that because the sufficiency of the information was not challenged in the trial court, defendant was barred from questioning its sufficiency on appeal. In reply to this contention we said: "It is undoubtedly true that a defendant, by his conduct in the trial court, may waive formal defects in an indictment or an information, but if an indictment or an information is fatally defective a defendant may take advantage of that fact in this court even though he did not raise the question in the trial court. A fatally defective indictment or information is not cured by verdict and judgment." With respect to the major contention that the information was fatally defective because it failed to aver essential elements of the offense of obtaining money by false pretenses, we sustained the contention because the information did not allege that defendant obtained the money with intent to cheat or defraud the prosecuting witness.

In People v. Blue, 222 Ill. App. 255, this division of the Appellate court reversed a judgment because the information failed to charge a crime in the language of the statute and said: "it is fundamental that an indictment or information must allege all the facts necessary to constitute the crime with which a defendant is charged, and if it does not set forth such facts with sufficient certainty it will not support the conviction." In People v. Krueger, 224 Ill. App. 662 (Abst.), the court reversed, without remanding, a conviction based upon an information which failed to contain the allegation that the weapon was carried upon the person "without a written license therefor," and held that no crime was charged and no lawful conviction of the defendant could be sustained. In People v. O'Brien, 251 Ill. App. 314, judg-

likewise failed to charge that the money was obtained "with intent to cheat or defraud." It was there argued that because the sufficiency of the information was not challenged in the trial court, defendant was barred from questioning its sufficiency on appeal. In reply to this contention we said: "It is undoubtedly true that a defendant, by his conduct in the trial court, may waive formal defects in an indictment or an information, but if an indictment or an information is totally defective a defendant may take advantage of that fact in this court even though he did not raise the question in the trial court. A totally defective indictment or information is not cured by verdict and judgment." With respect to the major contention that the information was totally defective because it failed to aver essential elements of the offense of obtaining money by false pretenses, we sustained the contention because the information did not allege that defendant obtained the money with intent to cheat or defraud the prosecuting witness.

In People v. Kane, 222 Ill. App. 275, this division of the appellate court reversed a judgment because the information failed to charge a crime in the language of the statute and said: "It is fundamental that an indictment or information must allege all the facts necessary to constitute the crime with which a defendant is charged, and if it does not set forth such facts with sufficient certainty it will not support the conviction." In People v. Kemper, 224 Ill. App. 662 (abst.), the court reversed, without remanding, a conviction based upon an information which failed to contain the allegation that the weapon was carried upon the person "without a written license therefor," and held that no crime was charged and no lawful conviction of the defendant could be sustained. In People v. O'Brien, 251 Ill. App. 314, indi-

ment was reversed without remanding because the information failed to contain the word "wilfully" which was used in defining the crime, although the term "unlawfully" had been used in the information.

People v. O'Brien, supra, is authority for holding that a judgment predicated upon a fatally defective information should be reversed without remanding, although no motions were made in the trial court as to its insufficiency, and that when no crime is charged in an information the court has no jurisdiction of the subject matter and the judgment is void. That rule finds support in People v. Buffo, 318 Ill. 380, wherein the court said: "To give a court jurisdiction of the subject matter in a criminal case it is essential that the accused be charged with a crime. If that is not done, a plea of guilty in manner and form as charged does not authorize the court to render a judgment of conviction for some criminal offense, and if a judgment is so rendered it is void and may be attacked collaterally." People v. Bandy, 239 Ill. App. 273, and cases cited therein are to the same effect.

The state takes the position "that an information is sufficient if the offense charged is in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury," and while it is conceded that the instant information was not in the exact language of the statute, it is urged that it was sufficiently clear to notify defendant of the charge he was to meet and that the terms "unlawfully," "intentionally," "maliciously" and "wilfully" are equivalent to charging defendant "with intent to cheat or defraud." In support of this contention the state cites People v. Slade, 319 Ill. App. 114 (Abst.), wherein People v. Glassberg, 326 Ill. 379, is relied upon as the basis of the court's conclusion that "Defects in an information that do not go to the real merits

ment was reversed without remanding because the information failed to contain the word "wilfully" which was used in defining the crime, although the term "unlawfully" had been used in the information.

People v. O'Brien, supra, is authority for holding that a judgment predicated upon a fatally defective information should be reversed without remanding, although no motions were made in the trial court as to its insufficiency, and that when no crime is charged in an information the court has no jurisdiction of the subject matter and the judgment is void. That rule finds support in People v. Duffy, 318 Ill. 380, wherein the court said: "To give a court jurisdiction of the subject matter in a criminal case it is essential that the accused be charged with a crime. If that is not done, a plea of guilty in manner and form as charged does not authorize the court to render a judgment of conviction for some criminal offense, and if a judgment is so rendered it is void and may be attacked collaterally." People v. Sandy, 239 Ill. pp. 273, and cases cited therein are to the same effect.

The state takes the position "that an information is sufficient if the offense charged is in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury," and while it is conceded that the instant information was not in the exact language of the statute, it is urged that it was sufficiently clear to notify defendant of the charge he was to meet and that the terms "unlawfully," "intentionally," "maliciously" and "wilfully" are equivalent to charging defendant "with intent to cheat or defraud." In support of this contention the state cites People v. Slade, 31 Ill. App. 114 (Abst.), wherein People v. Glassberg, 326 Ill. 379, is relied upon as the basis of the court's conclusion that "Defects in an information that do not go to the real merits

of the case on the question of the guilt or innocence of the accused are considered waived after judgment, when the sufficiency of the information is not questioned in the trial court." However, we find that in the Glassberg case the indictment for conspiracy charged the offense in the language of the statute and the indictment was judged sufficient, when not challenged, although it failed to allege the means by which the unlawful act was to be accomplished. Therefore, the Glassberg case does not sustain the contention made by the state. Moreover, in the Slade case the information upon which defendant was tried charged her "with unlawfully, intentionally and maliciously" giving a false address to a physician for the purpose of procuring a written order for narcotics. Paragraph 192.20 of chapter 38 of the Illinois Revised Statutes 1937, upon which the information was based, prohibits any person from attempting to obtain a narcotic drug "by the use of a false name or the giving of a false address." The information was therefore not defective, and the court simply held that formal defects in an information that do not go to the real merits of the case on the question of the guilt or innocence of the accused are considered waived after judgment when the sufficiency of the information is not questioned in the trial court.

In view of our conclusion as to the principal contention made, it becomes unnecessary to discuss the other points urged. For the reasons indicated, the judgment of the Municipal court is reversed.

JUDGMENT REVERSED.

Scanlan and Sullivan, JJ., concur.

of the case on the question of the guilt or innocence of the accused are considered waived after judgment, when the sufficiency of the information is not questioned in the trial court." However, we find that in the Massengale case the indictment for conspiracy charged the offense in the language of the statute and the indictment was judged sufficient, when not challenged, although it failed to allege the means by which the unlawful act was to be accomplished. Therefore, the Massengale case does not sustain the contention made by the State. Moreover, in the Wade case the information upon which defendant was tried charged her "with unlawfully, intentionally and knowingly" giving a false address to a physician for the purpose of procuring a written order for narcotics. Paragraph 192.20 of chapter 38 of the Illinois Revised Statutes 1957, upon which the information was based, prohibits any person from attempting to obtain a narcotic drug "by the use of a false name or the giving of a false address." The information was therefore not defective, and the court simply held that formal defects in an information that do not go to the real merits of the case on the question of the guilt or innocence of the accused are considered waived after judgment when the sufficiency of the information is not questioned in the trial court.

In view of our conclusion as to the principal contention made, it becomes unnecessary to discuss the other points urged. For the reasons indicated, the judgment of the municipal court is reversed.

JUDGMENT REVERSED.

Scanlan and Sullivan, JJ., concur.

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HAROLD MANZESKE,
Appellee,

v.

YELLOW CAB COMPANY, a corporation, and HERBERT DITTMAN,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

322 I.A. 280²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants to recover damages for personal injuries sustained by him in an accident that occurred at the intersection of Clark street and Montrose avenue, Chicago, on February 8, 1940. A jury returned a verdict finding defendants guilty and assessing plaintiff's damages at $6,600. Defendants appeal from a judgment entered upon the verdict.

The complaint alleges that on February 8, 1940, defendant Yellow Cab Company was operating, through its servant and employee, defendant Herbert Dittman, a cab at the aforementioned intersection; that said cab was suddenly stopped and brought to a standstill in said intersection without notice or warning, facing in an easterly direction; that plaintiff then and there was riding upon a certain motorcycle which he was operating in a northerly direction and that he was in the exercise of ordinary care for his own safety; that said motorcycle forcibly and violently ran into and struck against the cab of defendants and thereupon forcibly and violently ran into and struck another motor vehicle proceeding in a southerly direction under the control of one Sjodin. The complaint further alleges that defendants were guilty of one or more of the following acts of negligence: (a) Carelessly and negligently caused their cab to be brought to a sudden stop in the intersection of said highways. (b) Carelessly and negligently caused their motor vehicle to be brought to a sudden stop in the intersection of said highways without giving suitable, sufficient and proper notice, signal and warning. (c) Carelessly and negligently

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FROM DIVISION

Appellee,

v.

YELLOW CAB COMPANY, a corporation, and SAMUEL WYMAN,

Appellants.

APPEAL FROM DISTRICT COURT OF CLARK COUNTY.

MR. JUSTICE SCHULMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants to recover damages for personal injuries sustained by him in an accident that occurred at the intersection of Clark street and Montrose avenue, Chicago, on February 6, 1940. A jury returned a verdict finding defendants guilty and assessing plaintiff's damages at $[illegible]. Defendants appeal from a judgment entered upon the verdict.

The complaint alleges that on February 6, 1940, defendant Yellow Cab Company was operating, through its servant and employee, defendant Robert Lattimer, a cab at the aforementioned intersection; that said cab was negligently stopped and brought to a forcible in said intersection without notice or warning, facing in an easterly direction; that plaintiff then and there was riding upon a certain motorcycle which he was operating in a northerly direction and that he was in the exercise of ordinary care for his own safety; that said motorcycle forcibly and violently ran into and struck against the cab of defendants and thereupon forcibly and violently ran into and struck another motor vehicle proceeding in a southerly direction under the control of one Rjodin. The complaint further alleges that defendants were guilty of one or more of the following acts of negligence: (a) Carelessly and negligently caused their cab to be brought to a sudden stop in the intersection of said highway. (b) Carelessly and negligently caused their motor vehicle to be brought to a sudden stop in the intersection of said highway without giving suitable, sufficient and proper notice, signal and warning. (c) Carelessly and negligently

caused their motor vehicle to be turned easterly into Montrose avenue without giving proper notice, signal and warning. The answer of defendants denies the charges made by plaintiff in the complaint. The sufficiency of the complaint is not challenged.

The errors assigned by defendants are: (1) The judgment is against the manifest weight of the evidence. (2) The trial court erred in giving to the jury instructions P20, P17, P5 and P22, requested by plaintiff, and in refusing a certain instruction requested by defendants. (3) The argument of the attorney for plaintiff to the jury was prejudicial. (4) The damages assessed are excessive.

It will be noted that defendants do not contend that plaintiff did not make out a prima facie case. After a careful examination of the evidence we find little difficulty in visualizing what occurred just before and at the time of the accident.

The accident happened shortly after midnight at the intersection of Clark street and Montrose avenue, Chicago. Each of these streets is a thoroughfare upon which the traffic is heavy. There are street car tracks on both streets and the traffic at the intersection is controlled by stop and go lights.

Plaintiff testified that he was twenty-two years of age and that he went to work after three and one-half years in high school; that at the time of the accident he owned a motorcycle with a sidecar attached to it; that the sidecar was large enough to carry one person; that on the evening in question he had gone to a "motorcycle meeting;" that Ruth Stone also rode on the motorcycle, sitting behind him; that after the meeting he and ten other motorcyclists went to a hamburger place, where they had hamburgers and Coca-Colas; that he and Miss Stone left the hamburger place about 11:20 or 11:25 p.m.; that it was a bright, clear night and cold; that just before the accident he

caused their motor vehicle to be turned suddenly into Montrose avenue without giving proper notice, signal and warning. The answer of defendants denies the charges made by plaintiff in the complaint. The sufficiency of the complaint is not challenged.

The errors assigned by defendants are: (1) the judgment is against the manifest weight of the evidence. (2) The trial court erred in giving to the jury instructions P20, P17, P5 and P22, requested by plaintiff, and in refusing a certain instruction requested by defendants. (3) The argument of the attorney for plaintiff to the jury was prejudicial. (4) The damages assessed are excessive.

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The accident happened shortly after midnight at the intersection of Clark street and Montrose avenue, Chicago. Each of these streets is a thoroughfare upon which the traffic is heavy. There are street car tracks on both streets and the traffic at the intersection is controlled by stop and go lights.

Plaintiff testified that he was twenty-two years of age and that he went to work after three and one-half years in high school; that at the time of the accident he owned a motorcycle with a sidecar attached to it; that the sidecar was large enough to carry one person; that on the evening in question he had gone to a "motorcycle meeting;" that Ruth Stone also rode on the motorcycle, sitting behind him; that after the meeting he and ten other motorcyclists went to a hamburger place, where they had hamburgers and Coca-Colas; that he and Miss Stone left the hamburger place about 11:20 or 11:25 P.M.; that it was a bright, clear night and cold; that just before the accident he

was going north on Clark street, which is paved with brick and is very bumpy approaching Montrose; that he was riding in the car tracks because it made a smoother ride; that he slowed down to about twenty miles per hour as he approached the intersection and the light turned green before he reached there; that he saw headlights coming south on Clark street in the south bound car tracks; that this vehicle was going a little bit faster than he was and it was practically across Montrose avenue before the driver made a left turn; that this driver was already past the Montrose car tracks when he made the turn; that he made it so suddenly that he, plaintiff, did not have a chance to stop and avoid a collision; that as the cab made the turn it was about ten feet away from plaintiff and when the rear end of the cab, that is, the rear two feet of the cab, was in the north bound Clark street car track, the cab suddenly stopped; that he, plaintiff, attempted to put on his brake and turn to the left to avoid hitting the cab but that the sidecar attached to his motorcycle came in contact with the rear end of the bumper of the Yellow cab, which turned his wheels to the left; that when the cab came to a stop it was facing east; that when the collision occurred plaintiff's body was thrown across the handlebars and the handle turned in such a way that the speed of the motor was accelerated and it proceeded across the street and collided with another car. "Q. At the time you hit the Yellow cab what happened to your right hand on your throttle? A. I was thrown on my left, over the left handle-bar and the girl behind me was up on my back and the motorcycle was up in the air on an angle and we went across the street and we collided with another car." Plaintiff further testified that the Yellow cab driver blew no horn and gave no signal of any kind of his intention to turn to the left or to suddenly stop. Upon cross-examination plaintiff testified that he knew that vehicles had a right to make left hand turns as

was going north on Clark street, which is paved with brick and is very busy approaching Montrose; that he was riding in the car tracks because it made a smoother ride; that he slowed down to about twenty miles per hour as he approached the intersection and the light turned green before he reached there; that he saw headlights coming south on Clark street in the south bound car tracks; that this vehicle was going a little bit faster than he was and it was practically across Montrose avenue before the driver made a left turn; that this driver was already past the Montrose car tracks when he made the turn; that he made it so suddenly that he, plaintiff, did not have a chance to stop and avoid a collision; that as the cab made the turn it was about ten feet away from plaintiff and when the rear end of the cab, that is, the rear two feet of the cab, was in the north bound Clark street car track, the cab suddenly stopped; that he, plaintiff, attempted to put on his brake and turn to the left to avoid hitting the cab but that the sidecar attached to his motorcycle came in contact with the rear end of the bumper of the Yellow cab, which turned his wheels to the left; that when the cab came to a stop it was facing east; that when the collision occurred plaintiff's body was thrown across the handlebars and the handle turned in such a way that the speed of the motor was accelerated and it proceeded across the street and collided with another car. "Q. At the time you hit the Yellow cab what happened to your right hand on your throttle? A. I was thrown on my left, over the left handle-bar and the girl behind me was up on my back and the motorcycle was up in the air on an angle and we went across the street and we collided with another car." Plaintiff further testified that the Yellow cab driver gave no hand and gave no signal of any kind of his intention to turn to the left or to suddenly stop. Upon cross-examination plaintiff testified that he knew that vehicles had a right to make left hand turns as

well as right hand turns when they signaled; that there was no traffic going north bound ahead of him that night between Irving Park and Montrose; that the intersection was well lighted; that he knew that both Clark street and Montrose were well traveled; that the cab was standing still when he hit the corner of the rear bumper; that when he hit the cab it jarred him; that if the cab had not stopped he would not have hit it.

Herman H. Dittman, defendant, the chauffeur of the Yellow cab, testified that he went to work about 4 o'clock p. m. and was cruising around to pick up passengers on streets where there was likely to be the most business; that his cab was empty and just before the accident he was traveling south on Clark street in the south bound car tracks and as he approached the intersection in question he was looking for a load; that the stop lights were green as he came up to the intersection and when he was about twenty feet north of it a prospective customer standing on the northeast corner of the intersection "held up his hand that he wanted a cab;" that he slowed up and thought that the passenger might come over and get into the cab, but he did not and he, the witness, then motioned to the customer to wait, that "I would be over there to get him," and the customer stayed where he was and he (the witness) "made a little right hand cut so that I could make a swing into Montrose," a swing to the left; that he made the turn at about eight to ten miles an hour, "pulled up into Montrose * * * facing east, northeast;" that he then stopped the cab because the lights were changing to amber and a car was waiting to go west on Montrose; that his cab remained stopped in the east side of the crosswalk; that as he was standing there the car facing west on Montrose started up and he heard a click and saw a motorcycle sliding off on two wheels going off in a northwesterly direction and it ran into the side of the car that

well as right hand turns when they signaled; that there was no traffic going north toward ahead of him that night between Irving Park and Montrose; that the intersection was well lighted; that he knew that both Clark street and Montrose were well traveled; that the cab was standing still when he hit the corner of the rear bumper; that when he hit the cab it jarred him; that if the cab had not stopped he would not have hit it.

Herman M. Pittman, defendant, the driver of the Yellow cab, testified that he went to work about 4 o'clock p. m. and was cruising around to pick up passengers on streets where there was likely to be the most business; that his cab was empty and just before the accident he was traveling south on Clark street in the south bound car tracks and as he approached the intersection in question he was looking for a load; that the stop lights were green as he came up to the intersection and when he was about twenty feet north of it a prospective customer standing on the northeast corner of the intersection "held up his hand that he wanted a cab;" that he slowed up and thought that the passenger might come over and get into the cab, but he did not and he, the witness, then continued to the customer to wait, that "I would be over there to get him," and the customer stayed where he was and he (the witness) "made a little right hand out so that I could make a swing into Montrose," a swing to the left; that he made the turn at about eight to ten miles an hour, "pulled up into Montrose * * * facing east, northeast;" that he then stopped the cab because the lights were changing to amber and a car was waiting to go west on Montrose; that his cab remained stopped in the east side of the crosswalk; that as he was standing there the car facing west on Montrose started up and he heard a jolt and saw a motorcycle sliding off on two wheels going off in a northwesterly direction and it ran into the side of the car that

was parked on the other corner; that he had been standing about three or four seconds when he heard the click and at that time the traffic lights were green for Montrose; that when he started to make the turn he saw a single light coming north on Clark street on the right side of the car tracks; that when he first saw the light it was 350 or 400 feet south of Montrose. On cross-examination the witness testified that when he stopped the cab the back of his car may have been a couple of feet west of the line of the east curb in Clark street and that a vehicle traveling two feet from the east curbstone might strike the back end of his car; that he was positive that the back end of his car was not in the north bound street car track on Clark street; that when he heard the click he did not know what it was that hit him; that when he made the turn to the left he was right up to the east bound track on Montrose; that he turned the cab to the left "at about half between the east bound and west bound rail;" that when he made the turn and got across the north bound rail on Clark street he was two feet south of the east bound track on Montrose and going in an easterly direction; that when he stopped two feet of the cab stuck out into Clark street; that just before the accident he saw a single headlight coming north on Clark street; that he could not tell whether it was a motorcycle or not; that it was about 200 or 250 feet south of him at the time. "Q. And what part of the street was it on? A. Between the cartrack and the curb. Q. Well, that is twelve to fourteen feet wide, now what part of the twelve to fourteen feet? * * * Q. So that light was about five or six or seven feet from the street cartracks? A. Yes, sir;" that he (Dittman) was just south of the east bound rails on Montrose when he last saw the light; that he kept on going and he came to the stop; that he was about twenty feet north of the crosswalk in the north side of Montrose when he saw the passenger put up his hand; that when a man puts up his hand

was parked on the other corner; that he had been standing about three or four seconds when he heard the gates and at that time the traffic lights were green for Montrose; that when he started to make the turn he saw a single light coming north on Clark street on the right side of the car in front; that when he first saw the light it was 300 or 400 feet south of Montrose. On cross-examination the witness testified that when he stopped the cab the back of his car may have been a couple of feet west of the line of the east curb in Clark street and that a vehicle travelling two feet from the east curbstone might strike the back end of his car; that he was positive that the back end of his car was not in the north bound street car track on Clark street; that when he heard the crash he did not know what it was that hit him; that when he made the turn to the left he was right up to the east bound track on Montrose; that he turned the cab to the left "at about mid-way between the east bound and west bound rails;" that when he made the turn and got across the north bound rail on Clark street he was two feet south of the east bound track on Montrose and going in an easterly direction; that when he stopped two feet of the cab stuck out into Clark street; that just before the accident he saw a single headlight coming north on Clark street; that he could not tell whether it was a motorcycle or not; that it was about 300 or 350 feet south of him at the time.

"Q. And that part of the street was it not? A. Between the car track and the curb. Q. Well, that is twelve to fourteen feet wide, now what part of the twelve to fourteen feet. * * * Q. So that light was about five or six or seven feet from the street curbstone? A. Yes, sir;" that he (Sitzman) was just south of the east bound rails on Montrose when he last saw the light; that he kept on going and he came to the stop; that he was about twenty feet north of the crosswalk in the north side of Montrose when he saw the passenger put up his hand; that when a man puts up his hand

he wants a cab; "Q. Well, you were going along and you saw the man? A. Yes, sir. Q. You saw him put up his hand? A. Yes, sir. Q. And you continued to watch him, didn't you? A. Yes. Q. You were interested in knowing what he was going to do? A. That is right. * * * Q. You kept on going and watching him? A. Yes, sir. Q. Well, where were you when you motioned to him or made that motion to him? A. Right on the crosswalk. Q. You were on the crosswalk? A. Yes, sir. Q. And were you watching him at that time? A. I looked over there, yes, sir. Q. Well, did he nod his head? A. Yes, sir. Q. He nodded his head? A. Yes, sir. Q. And you kind of pointed down with your finger, as though you were coming over to that side of the street? A. I motioned that I would be over there." The witness further testified that he was just about crossing the line of the north curbstone in Montrose when he motioned to the man that he would be over there; that the only signal he made was the one he made to the prospective customer.

There was other evidence in the case, some of which corroborated plaintiff and some of which corroborated Dittman's testimony, but we do not deem it necessary to refer specifically to all of this other evidence.

Section 69, par. 166, of the Motor Vehicle Act (ch. 95 1/2, Ill. Rev. Stat. 1943) provides:

"Vehicle turning left at intersection. Any driver of a vehicle approaching an intersection with the intent to make a left turn shall do so with caution and with due regard for traffic approaching from the opposite direction and shall not make such left turn until he can do so with safety."

Section 65, par. 162, of the Act provides, inter alia:

"When signal required. (a) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the

he wants a call; Q. Well, you were going along and you saw the man? A. Yes, sir. Q. You saw him put up his hand? A. Yes, sir. Q. And you continued to watch him, didn't you? A. Yes. Q. You were interested in knowing what he was going to do? A. That is right. * * * Q. You kept on going and watching him? A. Yes, sir. Q. Well, where were you when you noticed to him or made that motion to him? A. Right on the crosswalk. Q. You were on the crosswalk? A. Yes, sir. Q. And were you watching him at that time? A. I looked over there, yes, sir. Q. Well, did he nod his head? A. Yes, sir. Q. He nodded his head? A. Yes, sir. Q. And you kind of pointed down with your finger, as though you were coming over to that side of the street? A. I motioned that I would be over there." The witness further testified that he was just about crossing the line of the north curbstone in Montrose when he motioned to the man that he would be over there; that the only signal he made was the one he made to the prosecutrix customer.

There was other evidence in the case, some of which corroborated plaintiff and some of which corroborated Littman's testimony, but we do not deem it necessary to refer specifically to all of this other evidence.

Section 69, par. 169, of the motor vehicle act (ch. 95 1/2, Ill. Rev. Stat. 1945) provides:

"Vehicle turning left at intersection. The driver of a vehicle approaching an intersection with the intent to make a left turn shall do so with caution and with due regard for traffic approaching from the opposite direction and shall not make such left turn until he can do so with safety."

Section 69, par. 169, of the act provides, inter alia:

"When signal required. (a) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the

horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement.

"(b) A signal of intention to turn right or left shall be given during not less than the last 100 feet traveled by the vehicle before turning."

In support of their contention that the verdict is against the manifest weight of the evidence, counsel for defendants have made an exhaustive analysis of the evidence for the purpose of sustaining their argument that the accident could not have happened in the manner testified to by plaintiff. In the case of Skala v. Lehon, 258 Ill. App. 252 (affirmed by the Supreme court in 343 Ill. 602), we said (p. 259):

"In his argument appellant seeks to demonstrate the impossibility, according to the law of physics, of the occurrence taking place in the manner testified to by appellee's witnesses. We shall not attempt to follow the line of reasoning. It involves accepting as absolutely accurate the testimony of certain witnesses as to speed, distances and relative positions, none of which in the excitement of such an occasion is likely to be definitely noted or retained in memory, and as to none of which the jury is required to agree in reaching a verdict as to liability. (Nelson v. Fehd, 203 Ill. 120, 125.) Accidents of this sort happen so instantaneously and unexpectedly as to render the observation and statement of all necessary facts and circumstances for the application of the law of physics too uncertain from which to draw reliable conclusions."

Defendants argue that the weight of the evidence shows that when the Yellow cab stopped the rear end of the cab "stuck out" into Clark street only two or three feet. The jury, we

horn if any pedestrian may be affected by such movement or after giving an approximate signal in the manner hereinbefore provided in the event any other vehicle may be affected by such movement.

"(b) A signal of intention to turn right or left shall be given during not less than the last 100 feet traveled by the vehicle before turning."

In support of their contention that the verdict is against the manifest weight of the evidence, counsel for defendants have made an exhaustive analysis of the evidence for the purpose of sustaining their argument that the accident could not have happened in the manner testified to by plaintiff. In the case of Wade v. Johnson, 250 Ill. App. 272 (affirmed by the Supreme court in 343 Ill. 602), we said (p. 279):

"In his argument appellant seeks to demonstrate the impossibility, according to the law of physics, of the occurrence taking place in the manner testified to by appellee's witnesses. We shall not attempt to follow the line of reasoning. It involves accepting as absolutely correct the testimony of certain witnesses as to speed, distances and relative positions, some of which in the excitement of such an occasion is likely to be definitely noted or retained in memory, and as to none of which the jury is required to agree in reaching a verdict as to liability. (Nelson v. Ewell, 201 Ill. 12, 18.) Accidents of this sort happen so instantaneously and unexpectedly as to render the observation and statement of all necessary facts and circumstances for the application of the law of physics too uncertain from which to draw reliable conclusions."

Defendants urge that the weight of the evidence shows that when the Yellow cab stopped the rear end of the cab "went out" into Clark street only two or three feet. The jury, we

think, were warranted in believing the testimony offered by plaintiff as to where the cab stopped. The argument of defendants is greatly weakened by the fact that Dittman, upon cross-examination, testified that the single light of the approaching vehicle the last time he saw it was about midway between the north bound track on Clark street and the curb on the east side of that street. Defendants argue that the speed of the motorcycle as it entered the intersection was greater than the speed testified to by plaintiff and they also argue that the evidence warrants a finding that plaintiff "ran through the red light," but these two arguments involve questions of fact that were determined by the jury adversely to defendants, and after a careful consideration of all of the evidence we are satisfied that we would not be justified in reversing the jury's finding. They cite the testimony of Dittman that when he reached the east crosswalk of Clark street the light changed to yellow and that it was three or four seconds after he came to a stop that he heard the click at the rear of the cab. The jury, by their verdict, settled the disputed questions of fact in favor of plaintiff and after a careful examination of the evidence we find ourselves satisfied with their findings. The argument of defendants' counsel that if the collision did not happen at the spot where plaintiff testified it happened, and it happened close to the east curb on Clark street, plaintiff's case falls, is, of course, without merit. As stated by our Supreme court in Nelson v. Fehd, 203 Ill. 120, 126: "It is the province of the jury to weigh not only the particular facts testified to, but the circumstances and reasonable probabilities arising from the facts so testified to." This rule applies with particular force to the facts of the instant case. The weakness of the defense is that the testimony of Dittman shows that in his desire to obtain the prospective customer as a passenger he was guilty of gross negligence. The intersection at Clark and Montrose is a busy one; there are street car tracks on both

think, were warranted in believing the testimony offered by plaintiff as to where the car stopped. The argument of defendants is greatly weakened by the fact that Mittman, upon cross-examination, testified that the single light of the approaching vehicle the last time he saw it was about midway between the north bound track on Clark street and the curb on the east side of that street. Defendants argue that the speed of the motorcycle as it entered the intersection was greater than the speed testified to by plaintiff and they also argue that the evidence warrants a finding that plaintiff "ran through the red light." but these two arguments involve questions of fact that were determined by the jury adversely to defendants, and after a careful consideration of all of the evidence we are satisfied that we would not be justified in reversing the jury's finding.

Only the testimony of Mittman that when he reached the east crosswalk of Clark street the light changed to yellow and that it was three or four seconds after he came to a stop that he heard the clock at the rear of the car. The jury, by their verdict, settled the disputed questions of fact in favor of plaintiff and after a careful examination of the evidence we find ourselves satisfied with their findings. The argument of defendants' counsel that if the collision did not happen at the spot where plaintiff testified it happened, and it happened close to the east curb on Clark street, plaintiff's case fails, is, of course, without merit. As stated by our supreme court in Nelson v. Hild, 203 Ill. 120, 130: "It is the province of the jury to weigh not only the particular facts testified to, but the circumstances and reasonable probabilities arising from the facts so testified to." This rule applies with particular force to the facts of the instant case. The weakness of the defense is that the testimony of Mittman shows that in his desire to obtain the prospective customer as a passenger he was guilty of gross negligence. The intersection at Clark and Montrose is a busy one; there are street car tracks on both

streets; traffic is heavy and is controlled by stop and go lights. At the time in question there were several cars proceeding in a southerly direction in Clark street and there were other cars in Montrose avenue waiting for the green light so that they might go west across Clark street. The prospective customer was on the northeast corner of the intersection and Dittman was so intent on picking him up that he seems to have centered his faculties upon reaching this man quickly from the time he first saw him until the accident. Dittman's testimony shows that he attempted to make a U turn in this busy intersection without giving any warning of his intent so to do and that while engaged in making the U turn he suddenly stopped without giving any warning of his intent to stop, and the jury were justified in finding from his testimony that he was constantly watching the prospective customer and gave little, if any, heed to the approach of north bound traffic on Clark street. The law is that a driver of a vehicle on approaching an intersection with intent to make a left turn shall do so with caution and with due regard for traffic approaching, and that he shall not make such a turn until he can do so with safety. It is idle to argue that Dittman, at the time and place in question, was observing the law. In his desire to reach the prospective customer quickly he seems to have lost all sense of care and caution. As we have heretofore stated, defendants do not contend that plaintiff did not make out a prima facie case, and we are satisfied that the contention of defendants that the verdict is against the manifest weight of the evidence is without merit.

As to point II, that the court erred in giving certain instructions for plaintiff, defendant contends that the court erred in giving instruction P20, which reads as follows: "The Court instructs the jurors that while they are the judges of the credibility of the witnesses, they have no right to arbi-

streets; traffic is heavy and is controlled by stop and go lights. At the time in question there were several cars proceeding in a southerly direction in Clark street and there were other cars in northern avenue waiting for the green light so that they might go west across Clark street. The plaintiff endeavored to cut on the northwest corner of the intersection and Bittner was so intent on pinning him up that he seems to have concentrated his faculties upon avoiding this one unlucky from the time he first saw his until the accident. Bittner's testimony shows that he attempted to make a U turn in this busy intersection without giving any warning of his intent so to do and that while engaged in making the U turn he suddenly stopped without giving any warning of his intent to stop, and the jury were justified in flouting from his testimony that he was constantly watching the prospective customer and pay little, if any, heed to the approach of north bound traffic on Clark street. The law is that a driver of a vehicle on approaching an intersection with intent to make a left turn must do so with caution and with due regard for traffic approaching, and that he shall not make such a turn until he can do so with safety. It is idle to argue that Bittner, at the time and place in question, was observing the law. In his desire to reach the prospective customer quickly he seems to have lost all sense of care and caution. As an have heretofore stated, defendants do not contend that plaintiff did not make out a prima facie case, and we are satisfied that the contention of defendants that the verdict is against the manifest weight of the evidence is without merit.

As to point 3, that the court erred in giving certain instructions for plaintiff, defendant contends that the court erred in giving instruction No., which reads as follows: "The court instructs the jurors that while they are the judges of the credibility of the witnesses, they have no right to arbi-

trarily disregard the testimony of the plaintiff, if they believe from the evidence it is credible, simply because he is interested in the result of the suit, but it is the duty of the jury to receive and weigh the testimony of such witness having in mind such fact, in the light of all the facts and circumstances, the same as they would receive and weigh the testimony of any other witness." The argument is that Dittman was also a natural person and that the instruction should have been so drawn that it would apply to both plaintiff and Dittman, and defendant cites certain cases that hold that where the plaintiff and defendant are natural persons and both testify, an instruction that the jury may consider the interest of the plaintiff in the result of the suit without any reference to the interest of the defendant is erroneous because it is calculated to impress the jury that the court entertained a special reason for discrediting the testimony of the plaintiff. As to the instant contention, it is sufficient to say that if there was a vice in instruction P20 an instruction given at the instance of defendant, D19, contains the same vice more prejudicially phrased. Instruction D19 reads: "In weighing and considering the credit to be given to the testimony of the plaintiff you have the right to take into consideration that he is the plaintiff and is interested in the result of the suit." All of the cases cited by defendants in support of the instant contention condemn the giving of instruction D19 where plaintiff and defendant are natural persons.

Defendants complain that the court erred in giving plaintiff's instruction P17, which concludes with the following: "If * * * you believe that the plaintiff has proved his case as alleged in the complaint by the greater weight of the evidence, you should find for the plaintiff," and they contend that the instruction is erroneous because it refers the jury to the complaint to determine whether plaintiff has proved his case. It is sufficient to say

trarily disregard the testimony of the plaintiff, if they believe from the evidence it is credible, simply because he is interested in the result of the suit, but it is the duty of the jury to receive and weigh the testimony of such witness having in mind such fact, in the light of all the facts and circumstances, the same as they would receive and weigh the testimony of any other witness." The argument is that Mittman was also a natural person and that the instruction should have been so drawn that it would apply to both plaintiff and Mittman, and defendant cites certain cases that hold that where the plaintiff and defendant are natural persons and both testify, an instruction that the jury may consider the interest of the plaintiff in the result of the suit without any reference to the interest of the defendant is erroneous because it is calculated to impress the jury that the court entertained a special reason for discrediting the testimony of the plaintiff. As to the instant contention, it is sufficient to say that if there was a vice in instruction 7C0 an instruction given at the instance of defendant, "I", remedies the same vice more pointedly phrased. Instruction 8I? reads: "In weighing and considering the credit to be given to the testimony of the plaintiff you have the right to take into consideration that he is the plaintiff and is interested in the result of the suit." All of the cases cited by defendants in support of the instant contention condemn the giving of instruction 7I? where plaintiff and defendant are natural persons.

Defendants complain that the court erred in giving plaintiff's instruction 8I?, which continues with the following: "If * * * you believe that the plaintiff has proved his case as alleged in the complaint by the greater weight of the evidence, you should find for the plaintiff," and they contend that the instruction is erroneous because it refers the jury to the complaint to determine whether plaintiff has proved his case. It is sufficient to say

that three instructions, D2, D10 and D15, given at the request of defendants, contain the same alleged vice.

Defendants contend that the court erred in giving plaintiff's instruction P5 to the jury. This instruction is a standard one and is usually given to cover the subject of damages. Defendants contend that in the second paragraph of the instruction it refers to the "future loss in earnings of the plaintiff," and that the evidence shows plaintiff was earning as much after the accident as he received before, and that the evidence does not warrant a finding by the jury that the removal of plaintiff's spleen had any effect on his future earning power. The evidence shows that plaintiff's spleen was seriously injured by the accident and that it was necessary to remove it. Dr. Theodore Roberg, Jr., performed the operation upon plaintiff and attended him. He testified: "The function of the spleen is largely that of a reservoir of blood, of red blood corpuscles. It is an organ of storage. In periods of excitement or exertion, where there forms a sudden effort, this spleen, which is a rather elastic organ, contracts like a sponge or perhaps an accordion and squeezes the extra amount of blood, which it contains in reserve and it is sent out into the blood stream. It is more or less of an emergency tank for the extra amount of blood that is needed under conditions of physical or emotional stress and it also serves as a filter, which strains out things that accumulate in the blood stream when the blood cells break down and there is debris and particles, that have no further use. The spleen serves as a filter for those particles. It also serves as a filter for bacteria and it is an organ that helps in resistance to infection. It is also a factor in producing white blood cells of the body, those white blood corpuscles or lucosites, that are sent out whenever there is an infection or an injury. It is also an organ, which is of value in some conditions in the coagulation of the blood; it also exerts an effect in that respect. The

that three instructions, D2, D10 and D15, given at the request of defendants, contain the same alleged vice.

Defendants contend that the court erred in giving plaintiff's instruction P5 to the jury. This instruction is a standard one and is usually given to cover the subject of damages. Defendants contend that in the second paragraph of the instruction it refers to the "future loss in earnings of the plaintiff," and that the evidence shows plaintiff was earning as much after the accident as he received before, and that the evidence does not warrant a finding by the jury that the removal of plaintiff's spleen had any effect on his future earning power. The evidence shows that plaintiff's spleen was seriously injured by the accident and that it was necessary to remove it. Dr. Theodore Soberg, Jr., performed the operation upon plaintiff and testified him. He testified: "The function of the spleen is largely that of a reservoir of blood, of red blood corpuscles. It is an organ of storage. In periods of excitement or exertion, where there forms a sudden effort, this spleen, which is a rather elastic organ, contracts like a sponge or perhaps an accordion and squeezes the extra amount of blood, which it contains in reserve and it is sent out into the blood stream. It is more or less of an emergency tank for the extra amount of blood that is needed under conditions of physical or emotional stress and it also serves as a filter, which strains out things that accumulate in the blood stream when the blood cells break down and there is debris and particles, that have no further use. The spleen serves as a filter for these particles. It also serves as a filter for bacteria and it is an organ that helps in resistance to infection. It is also a factor in producing white blood cells of the body, those white blood corpuscles or leucocytes, that are sent out whenever there is an infection or an injury. It is also an organ, which is of value in some conditions in the coagulation of the blood; it also exerts an effect in that respect. The

spleen plays a part in the mechanism of blood clotting. * * * The spleen has something to do with coagulation, the manufacture of blood. It serves not only as a reservoir for the emergency provision of red blood corpuscles but it plays a role in the manufacture and origin of red cells of the blood. This is one of the organs that we have that keeps us from becoming anemic under normal conditions although there are other organs scattered throughout the body that serve the same function. Nature has no opportunity for providing a new spleen when the organ, which is a unit in itself, is removed from the body. Nature can never replace it. Sometimes it is able to replace parts of organs but very rarely. When the spleen is removed there may be accessory spleens, little spleens scattered about in the abdominal cavity, which may become larger after the spleen itself has been removed but those occur so rarely that we can say that when the spleen is removed it never reforms or nature never provides a new one." We are of the opinion that a jury might reasonably find from the testimony of Dr. Roberg that by reason of the loss of his spleen, plaintiff, a young man, might, in the future, suffer in health and thereby sustain a loss in income.

Defendants contend that the court erred in giving instruction P22 at the request of plaintiff. The instruction reads as follows: "The degree of proof required of the plaintiff is that he prove his case by a preponderance of the evidence. This means that upon the <u>question of fact</u> which the plaintiff is required to prove, he must have a greater weight or preponderance of evidence. But this rule does not require the plaintiff to prove any fact beyond a reasonable doubt; a fact is sufficiently proved if the jury find that the greater weight of the evidence is in his favor." (Italics ours.) Defendants argue that the instruction is erroneous because plaintiff was required to prove more than one question of fact in order to sustain a verdict and therefore the word "question"

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Defendants contend that the court erred in giving instruction P22 at the request of plaintiff. The instruction reads as follows: "The degree of proof required of the plaintiff is that he prove his case by a preponderance of the evidence. This means that upon the question of fact which the plaintiff is required to prove, he must have a greater weight or preponderance of evidence. But this rule does not require the plaintiff to prove any fact beyond a reasonable doubt; a fact is sufficiently proved if the jury find that the greater weight of the evidence is in his favor." (Italics ours.) Defendants argue that the instruction is erroneous because plaintiff was required to prove more than one question of fact in order to sustain a verdict and therefore the word "question"

should be plural. This contention is too hypercritical to deserve serious consideration.

Defendants contend that the court erred in refusing an instruction offered by them on the subject of contributory negligence. The subject of contributory negligence was fully covered by five instructions given at the instance of defendants.

Defendants contend that the argument of the attorney for plaintiff to the jury was prejudicial to them. We find no substantial merit in this contention.

Defendants contend that the damages assessed by the jury are excessive. In considering the amount of the damages allowed, $6,600, it is necessary to remember that plaintiff paid for hospital bills and nurses' services $818, and that the charge made by the doctor for his services is $1,500. We have already referred to the fact that the spleen of plaintiff was removed and to the evidence as to the functions of the spleen in the human body. After plaintiff was taken to the hospital he suffered intense pain, his abdomen began to blow up, his pulse became rapid, and he became very weak. He had difficulty in getting his breath and examinations indicated that there was some fluid present in the abdomen. Plaintiff underwent a major surgical operation and almost a quart and a half of blood that had come from the spleen was taken out of the abdominal cavity. The spleen was badly torn and blood was rapidly flowing from it. For the week following the operation plaintiff became steadily worse, and during the first seven or eight days he received eight blood transfusions. He had a high fever and a rapid pulse. At times he was delirious and at other times he was almost in a coma. His abdomen blew up again and for a week he was fed entirely through his veins and there was paralysis of the intestines. The incision which had been made in the abdominal wall opened up and became infected and it was necessary for the surgeon to reconstruct and repair

should be plural. This contention is too hypercritical to deserve serious consideration.

Defendants contend that the court erred in refusing an instruction offered by them on the subject of contributory negligence. The subject of contributory negligence was fully covered by five instructions given at the instance of defendants.

Defendants contend that the argument of the attorney for plaintiff to the jury was prejudicial to them. We find no substantial merit in this contention.

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the abdominal wall. The blood transfusions were given plaintiff because of the severe fever and the condition of shock and anemia from which he suffered. For at least a week after he was taken to the hospital he had to be fed entirely through the veins and a number of things had to be done to overcome the paralysis of his intestine, that was causing the distention or blowing up of his abdomen. He was given two spinal anesthesia that caused a paralysis of his entire body from his upper chest and down, to help relieve the condition. It would unduly lengthen this decision to give the entire testimony of Dr. Roberg. Defendants offered no medical testimony in rebuttal. The contention of defendants that the damages awarded are excessive is without merit.

Defendants have had a fair trial. The verdict of the jury was fully justified by the evidence and the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

the abdominal wall. The blood transfusions were given plaintiff because of the severe fever and the condition of shock and anemia from which he suffered. For at least a week after he was taken to the hospital he had to be fed entirely through the veins and a number of things had to be done to overcome the paralysis of his intestines, that was causing the distention or blowing up of his abdomen. Dr. was given two spinal anesthesia that caused a paralysis of his entire body from his upper chest and down, to help relieve the condition. It would unduly lengthen this decision to give the entire testimony of Dr. Kobert. Defendants offered no medical testimony in rebuttal. The contention of defendants that the damages awarded are excessive is without merit.

Defendants have had a fair trial. The verdict of the jury was fully justified by the evidence and the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

42742

322 I.A. 281

ROME SOAP MANUFACTURING COMPANY, a corporation, (Plaintiff) Respondent,

v.

JOHN T. LA FORGE & SONS, INC., a corporation; NEW YORK CENTRAL RAILROAD COMPANY, a corporation, and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a corporation, Defendants.

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JOHN T. LA FORGE & SONS, INC., a corporation, (Defendant) Petitioner,

v.

NEW YORK CENTRAL RAILROAD COMPANY, a corporation, and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a corporation, (Defendants) Respondents.

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PETITION FOR LEAVE TO APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF COOK COUNTY GRANTING A NEW TRIAL.

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MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John T. La Forge & Sons, Inc., defendant, filed its petition in this court for leave to appeal from the following order entered on April 19, 1943:

"This matter coming on to be heard on motion of the Rome Soap Manufacturing Company, plaintiff herein, and the court having heard arguments of counsel and being fully advised in the premises finds as follows:

"That due notice has been given to all parties herein and that all parties have appeared in court by their respective counsel; that an order was entered herein on March 19, 1943, on motion of the defendants, New York Central Railroad Company and Chicago, Burlington & Quincy Railroad Company, setting aside the verdict of the jury theretofore returned, and ordering a new trial of this cause. The court further finds that the order of the court on March 19, 1943, was that the verdict of the jury theretofore returned, should be set aside in its entirety and that there should be a new trial as to all of

ROME SOAP MANUFACTURING COMPANY,
a corporation,
(Plaintiff) Respondent,

v.

JOHN T. LA FORGE & SONS, INC., a
corporation; NEW YORK CENTRAL
RAILROAD COMPANY, a corporation,
and CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, a corporation,
Defendants.

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JOHN T. LA FORGE & SONS, INC.,
a corporation,
(Defendant) Petitioner,

v.

NEW YORK CENTRAL RAILROAD COMPANY,
a corporation, and CHICAGO, BURLING-
TON & QUINCY RAILROAD COMPANY, a
corporation,
(Defendants) Respondents.

MR. JUSTICE SCALLAN DELIVERED THE OPINION OF THE COURT.

John T. La Forge & Sons, Inc., defendant, filed its petition in this court for leave to appeal from the following order entered on April 19, 1943:

"This matter coming on to be heard on motion of the Rome Soap Manufacturing Company, plaintiff herein, and the court having heard arguments of counsel and being fully advised in the premises finds as follows:

"That due notice has been given to all parties herein and that all parties have appeared in court by their respective counsel; that an order was entered herein on March 19, 1943, on motion of the defendants, New York Central Railroad Company and Chicago, Burlington & Quincy Railroad Company, setting aside the verdict of the jury theretofore returned, and ordering a new trial of this cause. The court further finds that the order of the court on March 19, 1943, was that the verdict of the jury theretofore returned, should be set aside in its entirety and that there should be a new trial as to all of

the parties to said cause, including the plaintiff, Rome Soap Manufacturing Company, and including the defendants, John T. La Forge & Sons, Inc., New York Central Railroad Company and Chicago, Burlington & Quincy Railroad Company.

"Now, Therefore, it is hereby ordered that the common law order heretofore entered by this court on March 19, 1943, be and the same hereby is amended by adding thereto the following:

"'It Is Further Ordered that the verdict of the jury heretofore returned herein be and it is hereby set aside, and that a new trial of said cause be had as to all parties, including the plaintiff, Rome Soap Manufacturing Company, and the defendants, John T. La Forge & Sons, Inc., New York Central Railroad Company and Chicago, Burlington & Quincy Railroad Company.'"

We allowed the appeal.

Rome Soap Manufacturing Company, plaintiff, filed its complaint against three defendants, John T. La Forge & Sons, Inc., a corporation (hereinafter sometimes referred to as La Forge); New York Central Railroad Company, a corporation, and Chicago, Burlington & Quincy Railroad Company, a corporation. Plaintiff's complaint alleges, in substance, that on June 20, 1941, plaintiff purchased from La Forge one tank carload of inedible animal tallow to be delivered to plaintiff at Rome, New York, freight charges prepaid by the seller; that defendant La Forge loaded a tank car on its switch track at Rockford, Illinois, with inedible animal tallow and had it ready for shipment on July 30, 1941; that said defendant then delivered that car to defendant Chicago, Burlington & Quincy Railroad Company, which hauled it to Chicago, Illinois, over its own tracks, and at that point turned it over to the defendant New York Central Railroad Company for delivery over the tracks of that railroad to plaintiff at Rome, New York; that it was the duty of La Forge to properly load the said tank

the parties to said cause, including the plaintiff, Rome Soap Manufacturing Company, and including the defendants, John T. La Forge & Sons, Inc., New York Central Railroad Company and Chicago, Burlington & Quincy Railroad Company.

"Now, Therefore, it is hereby ordered that the common law order heretofore entered by this court on March 19, 1943, be and the same hereby is amended by adding thereto the following:

"'It Is Further Ordered that the verdict of the jury heretofore returned herein be and it is hereby set aside, and that a new trial of said cause be had as to all parties, including the plaintiff, Rome Soap Manufacturing Company, and the defendants, John T. La Forge & Sons, Inc., New York Central Railroad Company and Chicago, Burlington & Quincy Railroad Company.'"

We allowed the appeal.

Rome Soap Manufacturing Company, plaintiff, filed its complaint against three defendants, John T. La Forge & Sons, Inc., a corporation (hereinafter sometimes referred to as La Forge); New York Central Railroad Company, a corporation, and Chicago, Burlington & Quincy Railroad Company, a corporation. Plaintiff's complaint alleges, in substance, that on June 20, 1941, plaintiff purchased from La Forge one tank carload of inedible animal tallow to be delivered to plaintiff at Rome, New York, freight charges prepaid by the seller; that defendant La Forge loaded a tank car on its switch track at Rockford, Illinois, with inedible animal tallow and had it ready for shipment on July 30, 1941; that said defendant then delivered that car to defendant Chicago, Burlington & Quincy Railroad Company, which hauled it to Chicago, Illinois, over its own tracks, and at that point turned it over to the defendant New York Central Railroad Company for delivery over the tracks of that railroad to plaintiff at Rome, New York; that it was the duty of La Forge to properly load the said tank

car and deliver it loaded and sealed to defendant Chicago, Burlington & Quincy Railroad Company; that it was the duty of the last named defendant to inspect the tank car, close all outlet valves, securely seal the car, and to safely and securely transport said tallow in said car to the carrier, which was then to transport said tallow to Rome, New York, and that it was the duty of the New York Central Railroad Company to inspect the tank car, close all outlet valves, securely seal the car, and to safely and securely transport the tallow in said car to Rome, New York; that while the tank car was in transit all of the tallow therein leaked out of the car, which leak was discovered at or near Erie, Pennsylvania. The complaint charges that defendant La Forge was negligent "(1) in not properly inspecting said tank car when it was received for loading, (2) in not properly loading said tank car, (3) in not properly closing the outlet valve and (4) in not properly sealing said tank car so that it would not have leaked;" that the Chicago, Burlington & Quincy Railroad Company was negligent "(1) in not properly inspecting said tank car at time of receiving it for transportation to Chicago, Illinois, (2) in not properly closing the outlet valve on said tank car and (3) in not properly sealing said tank car so that it would not have leaked;" that defendant New York Central Railroad Company was negligent "(1) in not properly inspecting said tank car at time of receiving it in Chicago, Illinois, for transportation to Rome, New York, (2) in not properly closing the outlet valve on said tank car, (3) in not properly sealing said tank car so that it would not have leaked and (4) in not properly transporting said tank car and the contents thereof and delivering them in Rome, New York, in the same condition they were in at time said tank car and the contents thereof were received by said N. Y. C. R. R."

Defendant New York Central Railroad Company filed

car and deliver it loaded and sealed to defendant Chicago, Burlington & Quincy Railroad Company; that it was the duty of the last named defendant to inspect the tank car, close all outlet valves, securely seal the car, and to safely and securely transport said tallow in said car to the carrier, which was then to transport said tallow to Rome, New York, and that it was the duty of the New York Central Railroad Company to inspect the tank car, close all outlet valves, securely seal the car, and to safely and securely transport the tallow in said car to Rome, New York; that while the tank car was in transit all of the tallow therein leaked out of the car, which leak was discovered at or near Erie, Pennsylvania. The complaint charges that defendant La Porge was negligent "(1) in not properly inspecting said tank car when it was received for loading, (2) in not properly loading said tank car, (3) in not properly closing the outlet valve and (4) in not properly sealing said tank car so that it would not have leaked;" that the Chicago, Burlington & Quincy Railroad Company was negligent "(1) in not properly inspecting said tank car at time of receiving it for transportation to Chicago, Illinois, (2) in not properly closing the outlet valve on said tank car and (3) in not properly sealing said tank car so that it would not have leaked;" that defendant New York Central Railroad Company was negligent "(1) in not properly inspecting said tank car at time of receiving it in Chicago, Illinois, for transportation to Rome, New York, (2) in not properly closing the outlet valve on said tank car, (3) in not properly sealing said tank car so that it would not have leaked and (4) in not properly transporting said tank car and the contents thereof and delivering them in Rome, New York, in the same condition they were in at time said tank car and the contents thereof were received by said N. Y. C. R. R."

Defendant New York Central Railroad Company filed

its answer denying the negligence charged against it in the complaint and praying that it be dismissed from the cause with its costs. Defendant Chicago, Burlington & Quincy Railroad Company and defendant La Forge each filed a like answer. Neither of the railroads filed a cross-claim for relief against La Forge, nor did the latter file any cross-claim against the railroads. The cause was tried before the court and a jury and on March 4, 1943, the following verdict was returned: "We the jury find the defendant The New York Central Railroad Co. a corporation and the Chicago, Burlington & Quincy Railroad Co. a corporation, guilty and assess the plaintiffs damages at the sum of $4,543.00 Dollars and we further find defendant John T. La Forge & Sons Inc., a corporation not guilty." On the same date the following judgment order was entered:

"Whereupon the court instructs the clerk to open and read the verdict, which verdict is as follows to-wit: 'We the jury find the defendants, New York Central Railroad Company, a corporation, and Chicago, Burlington & Quincy Railroad Company, a corporation, guilty, and assess the plaintiff's damages at the sum of Four thousand five hundred forty three dollars ($4543.00); and find the defendant, John T. La Forge and Sons Inc., a corporation, not guilty.'

"Therefore it is considered by the court that the plaintiff do have and recover of and from the defendants, New York Central Railroad Company, a corporation, and Chicago, Burlington & Quincy Railroad Company, a corporation, its said damages of Four thousand five hundred forty three dollars ($4543.00) in form as aforesaid by the jury assessed, together with its costs and charges in this behalf expended and have execution therefor.

"It is further considered by the court that the plaintiff take nothing by its said suit against the defendant, John

its answer denying the negligence charged against it in the complaint and praying that it be dismissed from the cause with its costs. Defendant Chicago, Burlington & Quincy Railroad Company and defendant La Forge Bros filed a like answer. Neither of the railroads filed a cross-claim for relief against La Forge, nor did the latter file any cross-claim against the railroads. The cause was tried before the court and a jury and on March 4, 1943, the following verdict was returned: "We the jury find the defendant The New York Central Railroad Co. a corporation and the Chicago, Burlington & Quincy Railroad Co. a corporation, guilty and assess the plaintiffs damages at the sum of $4,543.00 Dollars and we further find defendant John T. La Forge & Sons Inc., a corporation not guilty." On the same date the following judgment order was entered:

"Whereupon the court instructs the clerk to open and read the verdict, which verdict is as follows to-wit: 'We the jury find the defendants, New York Central Railroad Company, a corporation, and Chicago, Burlington & Quincy Railroad Company, a corporation, guilty, and assess the plaintiff's damages at the sum of Four thousand five hundred forty three dollars ($4543.00); and find the defendant, John T. La Forge and Sons Inc., a corporation, not guilty.'

"Therefore it is considered by the court that the plaintiff do have and recover of and from the defendants, New York Central Railroad Company, a corporation, and Chicago, Burlington & Quincy Railroad Company, a corporation, its said damages of Four thousand five hundred forty three dollars ($4543.00) in form as aforesaid by the jury assessed, together with its costs and charges in this behalf expended and have execution therefor.

"It is further considered by the court that the plaintiff take nothing by its said suit against the defendant, John

T. La Forge and Sons Inc. a corporation, and that the said defendant go hence without day and do have and recover of and from the plaintiff, Rome Soap Manufacturing Company, a corporation, its costs and charges in this behalf expended and have execution therefor."

On March 12, 1943, each of the defendant railroads filed a motion for judgment notwithstanding the verdict, a motion in arrest of judgment and a motion for a new trial. Plaintiff never at any time filed a motion for a new trial against defendant La Forge, nor did it, within ten days from the date of the entry of the judgment order, nor at any time, obtain or ask for any extension of time for the filing of such a motion. On March 19, 1943, the following order was entered:

"This cause coming on to be heard upon the motion of the defendant, New York Central Railroad Company, a corporation, for a judgment non obstante veredicto; after arguments of counsel and due deliberation by the court said motion is overruled and denied.

"Thereupon this cause coming on to be heard upon the motion of the defendant, New York Central Railroad Company, a corporation, in arrest of judgment; after arguments of counsel and due deliberation by the court said motion is overruled and denied.

"Thereupon this cause coming on to be heard upon the motion of the defendant, New York Central Railroad Company, a corporation, for a new trial herein; after arguments of counsel and due deliberation by the court, said motion is allowed, and a new trial awarded.

"Thereupon this cause coming on to be heard upon the motion of the defendant, Chicago, Burlington & Quincy Railroad Co. a corp., for a judgment non obstante veredicto; after arguments of counsel and due deliberation by the court said motion is overruled and denied.

"Thereupon this cause coming on to be heard upon the

T. La Forge and Sons Inc. a corporation, and that the said defendant go hence without day and do have and recover of and from the plaintiff, Home Soap Manufacturing Company, a corporation, its costs and charges in this behalf expended and have execution therefor."

On March 12, 1943, each of the defendant railroads filed a motion for judgment notwithstanding the verdict, a motion in arrest of judgment and a motion for a new trial. Plaintiff never at any time filed a motion for a new trial against defendant La Forge, nor did it, within ten days from the date of the entry of the judgment order, nor at any time, obtain or ask for any extension of time for the filing of such a motion. On March 1, 1943, the following order was entered:

"This cause coming on to be heard upon the motion of the defendant, New York Central Railroad Company, a corporation, for a judgment non obstante veredicto; after arguments of counsel and due deliberation by the court said motion is overruled and denied.

"Thereupon this cause coming on to be heard upon the motion of the defendant, New York Central Railroad Company, a corporation, in arrest of judgment; after arguments of counsel and due deliberation by the court said motion is overruled and denied.

"Thereupon this cause coming on to be heard upon the motion of the defendant, New York Central Railroad Company, a corporation, for a new trial herein; after arguments of counsel and due deliberation by the court, said motion is allowed, and a new trial awarded.

"Thereupon this cause coming on to be heard upon the motion of the defendant, Chicago, Burlington & Quincy Railroad Co. a corp., for a judgment non obstante veredicto; after arguments of counsel and due deliberation by the court said motion is overruled and denied.

"Thereupon this cause coming on to be heard upon the

motion of the defendant, Chicago, Burlington & Quincy Railroad Co. a corp., in arrest of judgment; after arguments of counsel and due deliberation by the court said motion is overruled and denied.

"Thereupon this cause coming on to be heard upon the motion of the defendant, Chicago, Burlington & Quincy Railroad Co. a corp., for a new trial herein; after arguments of counsel and due deliberation by the court said motion is allowed and a new trial awarded."

At the time of the entry of the aforesaid order, there was no motion of plaintiff pending before the court. On April 16, 1943, which was forty-two days after the entry of the judgment on the verdict in favor of defendant La Forge, defendant New York Central Railroad Company served the following "notice and motion:"

"Please take notice that on the 16th day of April, 1943, at the opening of court in the forenoon of said date, or as soon thereafter as counsel may be heard, I shall appear before the Honorable Daniel Trude, one of the judges of said court, in the court room usually occupied by him in the County Building, Chicago, Illinois, or before any other judge who may be sitting in his place and stead, and will then and there ask that an order be entered clarifying the order heretofore entered on March 19, 1943, so as to indicate the true intention of the court and so as to correctly state the order of the court in setting aside the verdict of the jury and ordering a new trial, at which time and place you may be present if you so desire.

"Sidney C. Murray

"F. W. Flott
"Attorneys for Defendant,
New York Central Railroad Company"

On the same date the following order was entered:

"This cause coming on to be heard upon the motion of the defendants New York Central Railroad Company, a corporation,

motion of the defendant, Chicago, Burlington & Quincy Railroad Co. a corp., in arrest of judgment; after arguments of counsel and due deliberation by the court said motion is overruled and denied.

"Thereupon this cause coming on to be heard upon the motion of the defendant, Chicago, Burlington & Quincy Railroad Co. a corp., for a new trial herein; after arguments of counsel and due deliberation by the court said motion is allowed and a new trial awarded."

At the time of the entry of the interlocutory order, there was no motion of plaintiff pending before the court. On April 16, 1943, which was forty-two days after the entry of the judgment on the verdict in favor of defendant In Error, defendant New York Central Railroad Company served the following "notice and motion:"

"Please take notice that on the 16th day of April, 1943, at the opening of court in the forenoon of said date, or as soon thereafter as counsel may be heard, I shall appear before the Honorable Daniel Trude, one of the judges of said court, in the court room usually occupied by him in the County Building, Chicago, Illinois, or before any other judge who may be sitting in his place and stead, and will then and there ask that an order be entered clarifying the order heretofore entered on March 17, 1943, so as to indicate the true intention of the court and so as to correctly state the order of the court in setting aside the verdict of the jury and ordering a new trial, at which time and place you may be present if you so desire.

"Sidney J. Murray

"F. W. Plott
"Attorneys for Defendant,
"New York Central Railroad Company"

On the same date the following order was entered:

"This cause coming on to be heard upon the motion of the defendants New York Central Railroad Company, a corporation,

and Chicago, Burlington & Quincy Railroad Company, a corporation, to clarify the order heretofore entered herein on March 19, A D 1943, granting a new trial as to these said defendants; after arguments of counsel and due deliberation by the court said motion is overruled and denied, without prejudice." (Italics ours.)

On April 19, 1943, which was forty-five days after the entry of the judgment order of March 4, 1943, plaintiff filed the following "notice and motion:"

"You are hereby notified that on Monday, the 19th day of April, 1943, at the opening of court in the forenoon, we shall appear before the Honorable Daniel Trude, one of the judges of said court, in the court room usually occupied by him in the County Building, Chicago, and will then and there request the court that an order be entered clarifying and amending the order heretofore entered in this cause on March 19, 1943, at which time and place you may appear if you see fit."

On the same day the trial court entered the order heretofore set forth, from which the petitioner was allowed to appeal. It will be noted that even in the motion filed by plaintiff on April 19, 1943, it did not move for a new trial, nor did it ask that the judgment order of March 4, 1943, as to defendant La Forge be vacated or modified in any way. It would be idle to contend that plaintiff's motion of April 19, 1943, could be considered as a motion for a new trial, for, not only was it not presented within ten days of judgment, as required by section 68 of the Civil Practice Act, but it fails to specify any grounds why a new trial should be granted, as required by that section. It is clear that counsel for plaintiff realized, when they filed the motion of April 19, 1943, that forty-five days had elapsed since the entry of the judgment order of March 4, and therefore they sought to avoid the effect of par. 82, ch. 77, Ill. Rev. Stat. 1941, that makes a judgment conclusive upon the expiration

and Chicago, Burlington & Quincy Railroad Company, a corporation, to clarify the order heretofore entered herein on March 19, A D 1943, granting a new trial as to these said defendants; after arguments of counsel and due deliberation by the court said motion is overruled and denied, without prejudice." (Italics ours.)

On April 19, 1943, which was forty-five days after the entry of the judgment order of March 4, 1943, plaintiff filed the following "notice and motion:"

"You are hereby notified that on Monday, the 19th day of April, 1943, at the opening of court in the forenoon, we shall appear before the Honorable Daniel Trude, one of the judges of said court, in the court room usually occupied by him in the County Building, Chicago, and will then and there request the court that an order be entered clarifying and amending the order heretofore entered in this cause on March 19, 1943, at which time and place you may appear if you see fit."

On the same day the trial court entered the order heretofore set forth, from which the petitioner was allowed to appeal. It will be noted that even in the motion filed by plaintiff on April 19, 1943, it did not move for a new trial, nor did it ask that the judgment order of March 4, 1943, as to defendant La Forge be vacated or modified in any way. It would be idle to contend that plaintiff's motion of April 19, 1943, could be considered as a motion for a new trial, for, not only was it not presented within ten days of judgment, as required by section 68 of the Civil Practice Act, but it fails to specify any grounds why a new trial should be granted, as required by that section. It is clear that counsel for plaintiff realized, when they filed the motion of April 19, 1943, that forty-five days had elapsed since the entry of the judgment order of March 4, and therefore they sought to avoid the effect of par. 82, ch. 77, Ill. Rev. Stat. 1941, that makes a judgment conclusive upon the expiration

of thirty days from the date of its rendition, by attempting to have the order of March 19, 1943, amended, although that order did not pertain to the verdict and judgment in favor of defendant La Forge and did not affect the verdict and judgment of March 4, 1943, so far as defendant La Forge is concerned.

Defendant La Forge contends that plaintiff's motion of April 19, 1943, cannot be considered as a motion brought under section 72 of the Practice Act, which abolishes the writ of error coram nobis and provides that all errors of fact committed in proceedings of any court of record which by the common law have been corrected by that writ may be corrected by motion. This contention is, of course, a meritorious one, and it is unnecessary for us to state the reasons and authorities that support the contention, as respondents concede, as they must, that the motion of April 19, 1943, was not brought under section 72.

On March 4, 1943, the jury returned a verdict finding defendant railroads guilty and defendant La Forge not guilty, and on the same day judgment was entered thereon. Section 68 (1) of the Civil Practice Act (Ill. Rev. Stat. 1941, ch. 110, par. 192) provides:

"It shall be sufficient for the jury to pronounce their verdict by their foreman in open court, without reducing the same to writing if it is a general verdict, and the court shall enter the same in form, under the direction of the court; and if either party may wish to move for a new trial or in arrest of judgment, or for a judgment notwithstanding the verdict, he shall, before final judgment be entered, or within ten days thereafter, or within such time as the court may allow on motion made within such ten days, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment and execution thereon shall thereupon be stayed until such motion can be heard by the court,

of thirty days from the date of its rendition, by attempting to have the order of March 1, 1943, amended, although that order did not pertain to the verdict and judgment in favor of defendant La Forge and did not affect the verdict and judgment of March 4, 1943, so far as defendant La Forge is concerned.

Defendant La Forge contends that plaintiff's motion of April 12, 1943, cannot be considered as a motion brought under section 72 of the Practice Act, which abolishes the writ of error coram nobis and provides that all errors of fact committed in proceedings of any court of record which by the common law have been corrected by that writ may be corrected by motion. This contention is, of course, a meritorious one, and it is unnecessary for us to state the reasons and authorities that support the contention, as reasonable people, as they must, that the motion of April 12, 1943, was not brought under section 72.

On March 4, 1943, the jury returned a verdict finding defendant Fairbrooks guilty and defendant La Forge not guilty, and on the same day judgment was entered thereon. Section 65 (1) of the Civil Practice Act (Ill. Rev. Stat. 1941, ch. 110, par. 192) provides:

"It shall be sufficient for the jury to pronounce their verdict by their foreman in open court, without reducing the same to writing if it is a general verdict, and the court shall enter the same in form, under the direction of the court; and if either party may wish to move for a new trial or in arrest of judgment, or for a judgment notwithstanding the verdict, he shall, before final judgment be entered, or within ten days thereafter, or within such time as the court may allow on motion made within such ten days, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment and execution thereon shall thereupon be stayed until such motion can be heard by the court

The time for appeal from such judgment shall not begin to run until the court shall rule upon the motion." (Italics ours.)

As we have heretofore stated, plaintiff filed no motion for a new trial against defendant La Forge within the ten day period nor did it take any steps within that period to obtain an extension of time to file such motion, nor did it ever file a motion for a new trial as to defendant La Forge. No other conclusion can be drawn from this record than that plaintiff for a considerable period of time was satisfied with the verdict and the judgment order of March 4, 1943, so far as they pertained to defendant La Forge and it would seem from the oral arguments upon this appeal that defendant railroads are the real parties attempting to sustain the order of April 19, 1943. Their counsel frankly concede that if defendant La Forge is retained in the cause it may tend to lessen the burden of the defendant railroads should there be another verdict rendered in favor of plaintiff, and they make the astonishing argument that the trial court in the instant case had the power to order a new trial for plaintiff as against La Forge even though plaintiff did not ask for a new trial nor desire it.

The liability of defendant La Forge is several and not joint (see Illinois Central R. R. Co. v. Foulks, 191 Ill. 57, 69) and the trial court on March 4, 1943, had full power to enter the judgment of that date, and the judgment entered was in accord with the verdict of the jury.

Paragraph 82 of chapter 77, Ill. Rev. Stat. 1941, reads as follows:

"Hereafter every judgment, decree or order, final in its nature, of any court of record in any civil or criminal proceeding shall have the same force and effect as a conclusive adjudication upon the expiration of thirty days from the date of its rendition as, under the law heretofore in force, it has had upon the expiration of the term of court at which it was rendered." (Italics ours.)

The time for appeal from such judgment shall not begin to run until the court shall rule upon the motion." (Italics ours.)

As we have heretofore stated, plaintiff filed no motion for a new trial against defendant La Forge within the ten day period nor did it take any steps within that period to obtain an extension of time to file such motion, nor did it ever file a motion for a new trial as to defendant La Forge. No other conclusion can be drawn from this record than that plaintiff for a considerable period of time was satisfied with the verdict and the judgment order of March 4, 1941, so far as they pertained to defendant La Forge and it could see from the oral arguments upon this appeal that defendant railroads and the real parties attempting to sustain the order of April 1, 1941. Their counsel frankly concede that if defendant La Forge is retained in the case it may tend to lessen the burden of the defendant railroads should there be another verdict rendered in favor of plaintiff, and they make the astonishing argument that the trial court in the instant case had the power to order a new trial for plaintiff as against La Forge even though plaintiff did not ask for a new trial nor desire it.

The liability of defendant La Forge is several and not joint (see Illinois Central R. R. Co. v. Porter, 191 Ill. 77, 69) and the trial court on March 4, 1941, had full power to enter the judgment of that date, and the judgment entered was in accord with the verdict of the jury.

Paragraph 11 of chapter 77, Ill. Rev. Stat. 1941, reads as follows:

"Hereafter every judgment, decree or order, final in its nature, of any court of record in any civil or criminal proceeding shall have the same force and effect as a conclusive adjudication upon the expiration of thirty days from the date of its rendition as, under the law heretofore in force, it has had upon the expiration of the term of court at which it was rendered."

(Italics ours.)

Section 50 (7) of the Civil Practice Act (Ill. Rev. Stat. 1941, ch. 110, par. 174) provides:

"The court may in its discretion before final judgment, set aside any default, and may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable." (Italics ours.)

It would seem hardly necessary to state that the law is settled that after thirty days from the entry of the judgment as to defendant La Forge, plaintiff not having filed a motion for a new trial, the trial court had no jurisdiction to set aside the verdict nor the judgment entered on March 4, 1943. Respondents seek to evade the effect of that law by contending that the thirty day period as to defendant La Forge commenced when the order of March 19, 1943, was entered. There is not the slightest merit in that contention. The order entered upon that day had no bearing and no effect upon the judgment of March 4, 1943, so far as it pertained to defendant La Forge, and did not affect the rights of that defendant in any way. On April 19, 1943, which was forty-five days after the verdict and judgment in favor of defendant La Forge, the trial court had no jurisdiction to enter the order of that date. That order purports to set aside the verdict of the jury as to defendant La Forge, although plaintiff's motion did not ask the court to enter any such order, nor does that order set aside the judgment entered March 4, 1943, as to defendant La Forge. We feel impelled to say that the order of April 19, 1943, is so indefensible that it is regrettable that defendant La Forge should have been obliged to take the instant proceedings to reverse it.

The defendant railroads have filed briefs upon this appeal, and defendant La Forge strenuously contends that as plaintiff is the only party to this cause that sought a judgment against La Forge, this appeal is no concern of defendant railroads

Section 50 (7) of the civil practice act (III. Rev. Stat. 1941, ch. 110, par. 174) provides:

"The court may in its discretion before final judgment, set aside any default, and may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable." (Italics ours.)

It would seem hardly necessary to state that the law is settled that after thirty days from the entry of the judgment as to defendant La Forge, plaintiff not having filed a motion for a new trial, the trial court had no jurisdiction to set aside the verdict nor the judgment entered on March 4, 1942. Respondents seek to evade the effect of that law by contending that the thirty day period as to defendant La Forge commenced when the order of March 19, 1942, was entered. There is not the slightest merit in that contention. The order entered upon that day had no bearing and no effect upon the judgment of March 4, 1942, so far as it pertained to defendant La Forge, and did not affect the rights of that defendant in any way. On April 13, 1942, which was forty-five days after the verdict and judgment in favor of defendant La Forge, the trial court had no jurisdiction to enter the order of that date. That order purports to set aside the verdict of the jury as to defendant La Forge, although plaintiff's motion did not ask the court to enter any such order, nor does that order set aside the judgment entered March 4, 1942, as to defendant La Forge. We find impossible to say that the order of April 13, 1942, is so indefensible that it is regrettable that defendant La Forge should have been obliged to take the instant proceeding to reverse it.

The defendant railroads have filed briefs upon this appeal. Defendant La Forge strenuously contends that as plaintiff is the only party to this cause that sought a judgment against La Forge, this appeal is no concern of defendant railroads

(citing Pecararo v. Halberg, 152 Ill. App. 443, 447 - affirmed, 246 Ill. 95), and they are not proper respondents in this cause and the briefs filed by them should be stricken from the files. While this contention has merit, we do not deem it necessary to pass upon this motion to strike.

The judgment order of the Circuit court of Cook county entered April 19, 1943, is reversed.

JUDGMENT ORDER ENTERED
APRIL 19, 1943, REVERSED.

Friend, P. J., and Sullivan, J., concur.

(citing Pearson v. Albers, 139 Ill. App. 444, 447 - affirmed, 240 Ill. 97), and they are not proper respondents in this cause and the briefs filed by them should be stricken from the files. While this contention has merit, we do not deem it necessary to pass upon this motion to strike.

The judgment order of the circuit court of Cook county entered April 10, 1941, is reversed.

JUDGMENT ORDER REVERSED.
APRIL 15, 1941, REVERSED.

Friend, P. J., and Sullivan, J., concur.

42210

ELENA BASSI,
Appellee,

v.

ROBERT E. L. BROOKS and
JOSEPHINE BROOKS,
Appellants.

APPEAL FROM THE MUNICIPAL
COURT OF CHICAGO.

390 112

322 I.A. 282

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action for money had and received by which plaintiff, Elena Bassi, seeks the return of $3,500 in principal and interest payments claimed to have been made by her and her husband (now deceased) under a contract for the purchase of real estate, which contract is entitled "Articles of Agreement for Warranty Deed," because of the alleged failure of defendants to deliver a deed when $500 of the principal amount of the purchase price had been paid as provided in said contract and because the title to the premises had been alienated under a "Notice of Forfeiture." The trial was had before the court without a jury and resulted in a judgment in favor of plaintiff for $750. Defendants appeal from said judgment.

The statement of claim filed August 1, 1941 alleged substantially that on January 7, 1922 plaintiff Elena Bassi and her husband entered into a contract with defendants for the purchase of the improved property at 10435 Calhoun avenue, Chicago, under the terms of which they entered into possession of the premises immediately and made monthly payments aggregating $2,400 on the principal amount of said contract, together with interest amounting to $1,100; that plaintiff's husband assigned his interest in the contract to her on March 1, 1939 and that he died on May 5, 1939; and that defendants did not, after $500 had been paid on the principal amount of the purchase price, deliver or tender to plaintiff a warranty deed in accordance with the terms of the contract,

42210

ELENA BASSI,
Appellee,

v.

ROBERT E. L. BROOKS and
JOSEPHINE BROOKS,
Appellants.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action for money had and received by which plaintiff, Elena Bassi, seeks the return of $2,500 in principal and interest payments alleged to have been made by her and her husband (now deceased) under a contract for the purchase of real estate, which contract is entitled "Articles of Agreement for Warranty Deed," because of the alleged failure of defendants to deliver a deed when $500 of the principal amount of the purchase price had been paid as provided in said contract and because the title to the premises had been alienated under a "Notice of Forfeiture." The trial was had before the court without a jury and resulted in a judgment in favor of plaintiff for $750. Defendants appeal from said judgment.

The statement of claim filed August 1, 1941 alleged substantially that on January 7, 1922 plaintiff Elena Bassi and her husband entered into a contract with defendants for the purchase of the improved property at 1044-46 Calhoun avenue, Chicago, under the terms of which they entered into possession of the premises immediately and made monthly payments aggregating $2,400 on the principal amount of said contract, together with interest amounting to $1,100; that plaintiff's husband assigned his interest in the contract to her on March 1, 1929 and that he died on May 5, 1939; and that defendants did not, after $500 had been paid on the principal amount of the purchase price, deliver or tender to plaintiff a warranty deed in accordance with the terms of the contract,

but "alienated title to the premises by a Notice of Forfeiture dated June 22, 1936, by the Trustees of Home Builders Investment Corporation, and Robert E. L. Brooks as Trustee." Copies of the contract and of the notice of forfeiture were attached to the statement of claim.

Plaintiff claims that "the defendants had and received from the plaintiff the sum of *** $3,500 as principal and interest under the contract *** and are liable therefor in said amount to the plaintiff."

The pertinent provisions of the contract are as follows:

"*** party of the second part [plaintiff] hereby covenants and agrees to pay to the said party of the first part [defendants] the sum of THIRTY-ONE HUNDRED DOLLARS, in the manner following: $293 in cash, receipt whereof is hereby acknowledged; $1,407 more to be paid in monthly installments of $20 each, or more on the 7th day of each and every month commencing February 7, 1922; subject to an incumbrance of $1,400 to Robert E. L. Brooks, Trustee, due June 12, 1922, which party of the second part assumes and agrees to pay, with interest at the rate of six per centum, payable monthly, on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may become payable or imposed upon said land, subsequent to the year 1918. And in case of the failure of the said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on their part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by them on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid.

"*** Warranty Deed and Torrens Certificate of Title to be delivered when $500 has been paid on principle and balance to be secured by second mortgage payable in monthly installments of $20.00, with six per centum interest per annum, payable monthly."

The notice of forfeiture, dated and served on plaintiff and her husband June 22, 1936, recites that they were $1,931 in arrears on the principal and interest payable under the contract of purchase, makes demand for the payment of said amount and declared defendants' intention to forfeit the contract if the arrearage was not paid by July 24, 1936.

Defendants' affidavit of defense averred that plain-

but "alienated title to the premises by a notice of forfeiture dated June 22, 1936, by the trustees of Home Builders Investment Corporation, and Robert E. L. Brooks as trustee." Copies of the contract and of the notice of forfeiture were attached to the statement of claim.

Plaintiff claims that "the defendants had and received from the plaintiff the sum of $[illegible]3,700 as principal and interest under the contract ** and are liable therefor in said amount to the plaintiff."

The pertinent provisions of the contract are as follows:

"*** party of the second part [plaintiff] hereby covenants and agrees to pay to the said party of the first part [defendants] the sum of "FIFTY-OVE HUNDRED DOLLARS, in the manner following: $293 in cash, receipt whereof is hereby acknowledged; $40 more to be paid in monthly installments of $20 each, or more on the 1st day of each and every month commencing February 7, 1936; subject to an interest of $1,400 to Robert E. L. Brooks, Trustee, due June 12, 1922, which party of the second part assumes and agrees to pay, with interest at the rate of six per centum, payable monthly, on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may become payable or imposed upon said land, subsequent to the year 1918. And in case of the failure of the said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on their part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by them on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid.

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The notice of forfeiture, dated and served on plaintiff and her husband June 22, 1936, recites that they were $1,931 in arrears on the principal and interest payable under the contract of purchase, makes demand for the payment of said amount and declared defendants' intention to forfeit the contract if the arrearage was not paid by July 24, 1936.

Defendants' affidavit of defense averred that plain-

tiff's action was barred by the statute of limitations; denied that defendants refused to execute a deed and stated that plaintiff and her husband did not want a deed when the $500 had been paid on the principal but agreed to continue making payments under the contract until the entire balance was paid; denied that $3,500 had been paid on the contract; and averred that plaintiff and her husband abandoned the premises in 1932 and thereafter refused to make further payments.

Defendants' theory as stated in their brief is as follows: "The statement of claim does not state a cause of action. The alleged cause of action is barred by the Statute of Limitations. *** There was no offer in the statement of claim to account for rents received and use and occupation of the premises or declaration of the willingness and ability of the plaintiff to perform her part of the contract. There was a waiver by plaintiff of the contract provision for a deed when $500 had been paid on the purchase price, and both parties considered the contract to be in full force and unbreached for years after the deed was due. The notice of forfeiture was properly given in accordance with the provisions of the contract, the plaintiff having been hopelessly in arrears for years before the forfeiture. The rents received by plaintiff and her use and occupation of the premises over a total period of ten years, more than balanced her payments under the contract, and no right to a refund of any sum was shown."

Plaintiff's theory seems to be that she is entitled to the return of all payments made by herself and her husband because of defendants' alleged breach of the contract in failing to deliver or tender to them a warranty deed when $500 had been paid on the principal of the contract.

There is no substantial dispute as to the facts. Plaintiff and her husband paid defendants $293 at the time of the

tiff's action was barred by the statute of limitations; inasmuch that defendants refused to execute a deed and stated that plaintiff and her husband did not want a deed when the $500 had been paid on the principal but agreed to continue making payments under the contract until the entire balance was paid; denied that $3,500 had been paid on the contract; and averred that plaintiff and her husband abandoned the premises in 1932 and thereafter refused to make further payments.

Defendants' theory as stated in their brief is as follows: "The statement of claim does not state a cause of action. The alleged cause of action is barred by the statute of limitations. *** There was no offer in the statement of claim to account for rents received and use and occupation of the premises or declaration of the willingness and ability of the plaintiff to perform her part of the contract. There was a waiver by plaintiff of the contract provision for a deed when $500 had been paid on the purchase price, and both parties considered the contract to be in full force and unrescinded for years after the deed was due. The notice of forfeiture was properly given in accordance with the provisions of the contract, the plaintiff having been hopelessly in arrears for years before the forfeiture. The rents received by plaintiff and her use and occupation of the premises over a total period of ten years, more than balanced her payments under the contract, and no right to a refund of any sum was shown."

Plaintiff's theory seems to be that she is entitled to the return of all payments made by herself and her husband because of defendants' alleged breach of the contract in failing to deliver or tender to them a warranty deed when $500 had been paid on the principal of the contract.

There is no substantial dispute as to the facts. Plaintiff and her husband paid defendants $293 at the time of the

execution of the contract of purchase, leaving a balance of principal of $1,407 to be paid by them in monthly installments of $20 or more. The purchasers assumed the first mortgage of $1,400 and agreed to pay it and they also agreed to pay the taxes. The last year that plaintiff and her husband paid taxes directly was 1929. They occupied the premises themselves from January 7, 1922, when the contract was executed, until August, 1926. When they moved out at that time they rented the house for $40 a month. They continued to receive rent therefor until January, 1932, for which month plaintiff testified she received $25 rent. Beginning February 7, 1922, the date of the first monthly payment due under the contract, they made their $20 monthly payments regularly until the end of 1930. In 1931 plaintiff and her husband paid $135 on the contract but because the $20 monthly payments were not being made regularly defendants demanded and received a written assignment of the rents on June 7, 1931. $85 was paid on the contract in 1932. No further payments were made by plaintiff and her husband with the exception of two or three small payments, aggregating $15, which were made in 1934.

Although defendants received the assignment of rents on June 7, 1931, they were unable to gain possession of the property to enable them to collect rents therefrom until December, 1932, for which month they collected $20 rent. Thereafter at the rate of $20 a month they collected $220 rent in 1933, $240 in 1934, $240 in 1935 and $105 in 1936. The total amount of rents collected by defendants prior to the notice of forfeiture was $825. Out of this amount they paid $378 interest on the first mortgage, $178.89 taxes, $108.65 for repairs, $47 for insurance, $32.65 for water taxes, $41.25 for commission on rent collections and $5 for "miscelleanous" expenses. Disallowing the items of "commission" and "miscelleanous," the other charges against the rents collected by defendants, which must be held to be proper

execution of the contract of purchase, leaving a balance of principal of $1,407 to be paid by them in monthly installments of $20 or more. The purchasers assumed the first mortgage of $1,400 and agreed to pay it and they also agreed to pay the taxes. The last year that plaintiff and her husband paid taxes directly was 1929. They occupied the premises themselves from January 7, 1922, when the contract was executed, until August, 1926. When they moved out at that time they rented the house for $40 a month. They continued to receive rent therefor until January, 1932, for which month plaintiff testified she received $25 rent. Beginning February 7, 1922, the date of the first monthly payment due under the contract, they made their $20 monthly payments regularly until the end of 1930. In 1931 plaintiff and her husband paid $135 on the contract but because the $20 monthly payments were not being made regularly defendants demanded and received a written assignment of the rents on June 7, 1931. $85 was paid on the contract in 1932. No further payments were made by plaintiff and her husband with the exception of two or three small payments, aggregating $15, which were made in 1934.

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and legitimate, amounted in the aggregate to $745.19. This left a net balance of $79.81 out of said rents to be credited to plaintiff and her husband on the contract. As heretofore shown, the purchasers made an initial payment of $293, leaving a balance of $1,407 due on the principal. Installment payments of $20 monthly, aggregating $3,460, were due under the contract prior to June 22, 1936, the date of the notice of forfeiture. These installments included interest on the first mortgage, interest on the unpaid balance of the principal and payments made on account on such principal. Plaintiff and her husband were entitled to a total credit of $2,468.31 on their monthly installment payments, which amount included $2,388.50 paid by them directly and the credit of $79.81 due them out of the rents collected by defendants. Since they should have paid $3,460 prior to June 22, 1936, when they received the notice of forfeiture, and had only paid $2,468.31, they were in default at that time to the extent of $991.69, and they had been continuously in default since 1931.

Plaintiff and her husband received rent from the premises ranging from $40 to $25 a month over a period of sixty-five months from September 1926 to and including January 1932. Assuming that the average rent during that period was $25 a month, they received a total of $1,625 in rent from the property. They lived on the premises with their family and had the use and enjoyment thereof over a period of fifty-five months from January 7, 1922 until August 1926. Assuming that the reasonable rental value of the premises during that period was at least $20 a month, a fair charge for the use and occupation of same was $1,100. Thus they benefited to the extent of $2,725 by way of rent received by them from the property and by the use and occupation thereof.

Having paid $500 on the principal amount of the contract on or shortly prior to February 9, 1925, plaintiff and her husband were entitled to a warranty deed at that time under the terms of

and legitimate, amounted in the aggregate to $74,19. This left a net balance of $79,81 out of said rents to be credited to plaintiff and her husband on the contract. As heretofore shown, the purchasers made an initial payment of $2,3, leaving a balance of $1,407 due on the principal. Installment payments of $20 monthly, aggregating $3,460, were due under the contract prior to June 2, 1926, the date of the notice of forfeiture. These installments included interest on the first mortgage, interest on the unpaid balance of the principal and payments made on account on such principal. Plaintiff and her husband were entitled to a total credit of $2,469.31 on their monthly installment payments, which amount included $2,388.50 paid by them directly and the credit of $79.81 due them out of the rents collected by defendants. Since they should have paid $3,460 prior to June 2, 1926, when they received the notice of forfeiture, and had only paid $2,469.31, they were in default at that time to the extent of $991.69, and they had been continuously in default since 1921.

Plaintiff and her husband received rent from the premises ranging from $40 to $45 a month over a period of sixty-five months from September 1926 to and including January 1932. Assuming that the average rent during that period was $45 a month, they received a total of $1,625 in rent from the property. They lived on the premises with their family and had the use and enjoyment thereof over a period of fifty-five months from January 7, 1922 until August 1926. Assuming that the reasonable rental value of the premises during that period was at least $20 a month, a fair charge for the use and occupation of same was $1,100. Thus they benefited to the extent of $2,725 by way of rent received by them from the property and by the use and occupation thereof.

Having paid $500 on the principal amount of the contract on or shortly prior to February 9, 1925, plaintiff and her husband were entitled to a warranty deed at that time under the terms of

the contract. It will be noted that the contract also provided that, contemporaneously with the delivery of the deed to plaintiff and her husband, they were required to execute a second mortgage to defendants to secure the payment of the unpaid balance then due on the principal, such "second mortgage to be payable in monthly installments of $20, with six per cent interest per annum, payable semi-annually." Defendants did not tender or deliver a warranty deed to plaintiff and her husband in February 1925 or at any other time and neither did plaintiff and her husband execute and deliver a second mortgage to defendants. As already shown, plaintiff and her husband continued to make their $20 monthly payments regularly until the end of 1930 and they also made some payments in 1931 and 1932.

Robert E. L. Brooks, Jr., testified that he was the vice president of Robert E. L. Brooks, Inc., which was the real estate company that had charge of this property; that plaintiff and her husband came to the office of said company in April 1925 in regard to the extension of the first mortgage; that he "took them to Mr. Harris who had handled them numerous times and knew them both well;" that he was present when Mr. Harris talked to them; and that "Mr. Harris told them they were entitled to a deed and that the Roseland State Savings Bank, who held the title, would get them a deed provided they signed the second mortgage in accordance with the terms of the contract. Mr. Bassi *** said that he didn't care to both with that. There was an expense connected with filing the second mortgage and the deed. He was satisfied going along with the contract until it was paid down to the mortgage." Neither plaintiff nor her husband ever demanded a warranty deed to the property.

Defendants insist that, since this action is for money had and received and since the contract contains no specific promise to return the payments made on the purchase price,

the contract. It will be noted that the contract also provided that, contemporaneously with the delivery of the deed to plaintiff and her husband, they were required to execute a second mortgage to defendants to secure the payment of the unpaid balance then due on the principal, such "second mortgage to be payable in monthly installments of $20, with six per cent interest per annum, payable semi-annually." Defendants did not tender or deliver a warranty deed to plaintiff and her husband in February 1929 or at any other time and neither did plaintiff and her husband execute and deliver a second mortgage to defendants. As already shown, plaintiff and her husband continued to make their $20 monthly payments regularly until the end of 1930 and they also made some payments in 1931 and 1932.

Robert E. L. Brooks, Jr., testified that he was the vice president of Robert E. L. Brooks, Inc., which was the real estate company that had charge of this property; that plaintiff and her husband came to the office of said company in April 1929 in regard to the extension of the first mortgage; that he "took them to Mr. Harris who had handled them numerous times and knew them both well;" that he was present when Mr. Harris talked to them; and that "Mr. Harris told them they were entitled to a deed and that the Roseland State Savings Bank, who held the title, would get them a deed provided they signed the second mortgage in accordance with the terms of the contract. Mr. Hasst *** said that he didn't care to both with that. There was an expense connected with filing the second mortgage and the deed. He was satisfied going along with the contract until it was paid down to the mortgage." Neither plaintiff nor her husband ever demanded a warranty deed to the property.

Defendants insist that, since this action is for money had and received and since the contract contains no specific promise to return the payments made on the purchase price,

plaintiff's claim must necessarily rest on a promise of the defendants implied by law to return such payments and that plaintiff cannot maintain an action on such an implied promise without rescinding the contract on the ground of the failure or refusal of defendants to perform it and without offering to restore what she and her husband received under the contract and showing that she is able and willing to discharge all the obligations which the contract cast upon her and her husband. In other words it is contended that the statement of claim stated no cause of action in the absence of an offer therein to credit defendants with the rents received by plaintiff and her husband and with the reasonable rental value of the property during the period when it was occupied by them.

Defendants also insist that, since this action can be predicated only upon defendants' oral implied promise to return the purchase payments, it is barred by the statute of limitations, not having been brought within five years after the alleged cause of action accrued.

While it may well be that there is merit in both of these contentions, we prefer to decide this case on its merits and in accordance with the equities of the respective parties. Plaintiff's right to recover is based solely upon the failure of defendants to deliver a warranty deed to her and her husband after they had paid $500 on the principal amount of the purchase price and it is asserted that in view of the defendants' failure in this regard the latter had no right under the law to declare a forfeiture. We are unable to perceive the slightest merit in plaintiff's claim. Under the contract plaintiff and her husband did have the right to insist upon the delivery to them of a warranty deed in February 1925 or at any time thereafter. Yet, the record discloses that neither of them even mentioned the deed for more than sixteen years or until this action was instituted on August 1, 1941. Plaintiff and her husband continued to make

plaintiff's claim must necessarily rest on a promise of the defendants implied by law to return such payments and that plaintiff cannot maintain an action on such an implied promise without rescinding the contract on the ground of the failure or refusal of defendants to perform it and without offering to restore what she and her husband received under the contract and showing that she is able and willing to discharge all the obligations which the contract cast upon her and her husband. In other words it is contended that the statement of claim stated no cause of action in the absence of an offer therein to credit defendants with the rents received by plaintiff and her husband and with the reasonable rental value of the property during the period when it was occupied by them.

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their payments under the contract regularly for almost six years after they were entitled to the delivery of the deed and for two years thereafter they made partial payments. There is nothing in the record to show that plaintiff or her husband requested the deed when they were entitled to it in 1925 or at any time thereafter. They must be held to have waived the contract provision for the delivery of the deed by reason of their conduct in continuing to make their payments under said contract in the manner indicated. Their failure to receive the deed did not prejudice or injure them in any way. But it appears that not only was the delivery of the deed waived by plaintiff and her husband but that they expressly agreed that they did not want the deed until the contract had been paid down to the first mortgage. According to the testimony of the witness Brooks, plaintiff's husband stated in her presence that he did not want the deed and that he did not want to execute the second mortgage, which he would have had to do, if the deed was delivered to them; that he did not want to incur the expense involved; and that in any event he preferred to make his payments under the contract until the principal of the purchase price was paid down to the first mortgage. The testimony of Brooks was corroborated by the conduct of plaintiff and her husband in continuing to make the contract payments for many years after they were entitled to the delivery of the deed and plaintiff made no attempt to refute the truth of Brooks' testimony.

Was the declaration of forfeiture justified? The court was not asked to declare a forfeiture in this case but to decide whether the forfeiture declared by defendants was justified under all the circumstances. In Lang v. Hedenberg, 277 Ill. 368, the court said at p. 377: "Undoubtedly, under the authorities, equity will not declare or enforce a forfeiture where it is harsh or inequitable to do so, but all the authorities recognize that competent parties may make a contract as to

their payments under the contract regularly for almost six years after they were entitled to the delivery of the deed and for two years thereafter they made partial payments. There is nothing in the record to show that plaintiff or her husband requested the deed when they were entitled to it in 1925 or at any time thereafter. They must be held to have waived the contract provision for the delivery of the deed by reason of their conduct in continuing to make their payments under said contract in the manner indicated. Their failure to receive the deed did not prejudice or injure them in any way. But it appears that not only was the delivery of the deed waived by plaintiff and her husband but that they expressly agreed that they did not want the deed until the contract had been paid down to the first mortgage. According to the testimony of the witness Brooks, plaintiff's husband stated in her presence that he did not want the deed and that he did not want to execute the second mortgage, which he would have had to do, if the deed was delivered to them; that he did not want to incur the expense involved; and that in any event he preferred to make his payments under the contract until the principal of the purchase price was paid down to the first mortgage. The testimony of Brooks was corroborated by the conduct of plaintiff and her husband in continuing to make the contract payments for many years after they were entitled to the delivery of the deed and plaintiff made no attempt to refute the truth of Brooks' testimony.

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penalties and forfeitures, and that courts of equity, as well as courts of law, will recognize the rights of the parties as to such penalties or forfeitures." Although the purchasers were in default since 1931 the declaration of defendants' intention to declare a forfeiture was not delivered to plaintiff and her husband until June 22, 1936, at which time they were $991.69 in arrears under the contract and apparently hopelessly in default. Neither plaintiff nor her husband made any response to the notice of forfeiture nor did they make any attempt to make any arrangement to complete their payments under the contract. Defendants exercised forbearance for more than five years before the declaration of intention to forfeit was served on the purchasers on June 22, 1936 and before the forfeiture was declared on August 3, 1936. This is not a case where the forfeiture of the contract was harsh or inequitable. Plaintiff and her husband paid $2,761.31 on their purchase contract. As already shown, this amount included interest on the first mortgage, interest on the unpaid balance of the principal and payments on account of the principal of the purchase price. They received benefits under the contract amounting to $2,725 by way of rent from the property and by their use and occupation thereof. Under all the facts and circumstances in evidence the conclusion is inevitable that plaintiff is not entitled to the relief sought.

We are impelled to hold that the finding in favor of plaintiff was against the manifest weight of the evidence and that the trial court erred in entering judgment thereon and for the reasons stated herein the judgment of the Municipal court of Chicago is reversed and judgment is entered here in favor of defendants and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE.

Friend, P. J., and Scanlan, J., concur.

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Friend, P. J., and Scanlan, J., concur.

42695

THEODORE TYLKE and MARY TYLKE,
Appellees,

v.

NORWEGIAN AMERICAN HOSPITAL, Inc., a corporation, and MARGARET AMUNDSON,
Defendants below.

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NORWEGIAN AMERICAN HOSPITAL, Inc., a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

394 113

322 I.A. 283

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiffs, Theodore Tylke and Mary Tylke, against defendants, Norwegian American Hospital, Inc., and Margaret Amundson, to recover damages for personal injuries alleged to have been caused by the negligence of said defendants. After the case was at issue it was placed upon the trial call and reached for trial on June 30, 1942, on which date it was dismissed for want of prosecution. On January 26, 1943 plaintiffs filed their written motion, supported by verified petition, under section 72 of the Civil Practice Act to vacate the order of dismissal of June 30, 1942. Defendant Norwegian American Hospital (hereinafter for convenience referred to as Hospital) filed its special appearance and a motion to dismiss plaintiffs' petition to vacate the order of dismissal on the ground that the court had no jurisdiction to consider said motion to vacate, more than 30 days having elapsed since the entry of such order. After a hearing on plaintiffs' petition to vacate and defendant Hospital's motion to dismiss said petition, the trial court entered the following order on January 29, 1943: "That the order entered herein on June 30, 1942 dismissing this cause for want of prosecution be and is hereby vacated, set aside and is hereby declared null and void. That the Clerk of this Court is ordered to redocket such cause and place the same on the trial calendar of this Court. That the motion of defendant Norwegian American

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Appellees,

v.

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a corporation, and MARGARET AMUNDSON,
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Hospital, Inc., to dismiss said petition of plaintiff be and it is overruled." Defendant Hospital appeals from this order.

Plaintiffs' verified petition to vacate the order of dismissal alleged substantially that, when the cause was reached for trial June 30, 1942, which was the last day for jury trials before the summer vacation period, it was proposed that it "go over to the September, 1942, term of court;" that "Thomas M. Morris, representing Margaret Amundson, one of the defendants herein, advised the court that his client, a registered nurse, was desirous of becoming a United States Army Nurse, but could not do so if this cause continued as a pending matter, suggested that the suit be dismissed for want of prosecution, and that a stipulation to reinstate the cause be entered into between the defendants and the plaintiffs through their respective counsel; that such cause be reinstated subsequent to thirty days after such dismissal; that in the meantime the nurses record would be free of pending litigation;" that "John J. Sullivan, the attorney representing the Norwegian American Hospital, Thomas M. Morris, representing Margaret Amundson, and your petitioner [Morris A. Haft] representing the plaintiffs agreed to such plan in the presence of his Honor Judge Daily, the trial judge, who also consented to such plan;" that thereafter, on July 16, 1942, Attorney Haft prepared a stipulation to reinstate the case and forwarded same with a letter to Attorney Thomas M. Morris requesting that he sign and return it; that on July 30, 1942, Attorney Haft again wrote Attorney Morris reminding him that he had failed to execute and return the stipulation; that Attorney Haft received the stipulation, signed by Attorney Morris, on July 31, 1942; that, having failed to receive any response to several letters written to John J. Sullivan, the then attorney for the Hospital, requesting his signature to the aforesaid stipulation, Attorney Haft wrote the following letter to General Accident Fire and Life Assurance Corporation,

Hospital, Inc., to dismiss said petition of plaintiff be and it is overruled." Defendant Hospital appeals from this order.

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the employer of Attorney John J. Sullivan:

"General Accident Fire and Life Assurance Corp.,
175 W. Jackson Boulevard,
Chicago, Illinois.

Attention: Legal Department.

In Re: Theodore Tylke vs. Norwegian American Hospital, Inc. Circuit Court No. 41-C-4965

Gentlemen:

By agreement between Thomas M. Morris, representing one of the defendants in this cause, John J. Sullivan, attorney representing Norwegian American Hospital and the writer, it was agreed that the above entitled cause might be dismissed and that thereafter a stipulation would be signed to reinstate this cause. This agreement was made in the presence of the Judge to whom such cause was assigned for trial.

Accordingly a stipulation to reinstate the cause was drawn in the latter part of July of 1942, which was signed by Thomas M. Morris, representing one of the defendants and the writer representing the plaintiffs and such stipulation was then forwarded to your office for signature on August 3, 1942. The stipulation was not returned to this office and thereafter the writer again wrote to Mr. Sullivan on October 15 and October 26, 1942, requesting that such stipulation be executed and returned to this office. At the present time I am still awaiting the return of the stipulation signed and I should appreciate your taking the necessary steps so to do, to the end that this cause might be reinstated in accordance with our agreement.

Will you kindly give this matter your attention.
Very truly yours,
Morris A. Haft."

It was then alleged that in response to the foregoing letter Attorney Haft received a letter from Attorney C. E. Heckler, the pertinent portions of which are as follows:

"Mr. Morris A. Haft,
134 No. LaSalle Street,
Chicago, Illinois.

Dear Mr. Haft:

Re: Theodore Tylke vs. Norwegian American Hospital, Circuit Court No. 41-C-4965.

Your letter of December 30, to the General Accident Fire & Life Assurance Corporation has been referred to me. Mr. Sullivan who was formerly in charge of the law department of the company, entered the United States Naval Service on November 1. I have succeeded to his duties.

***

There is nothing in the file to indicate any agreement on the part of Mr. Sullivan to stipulate that the case might be reinstated, and in view of the fact that

the employer of Attorney John J. Sullivan:

"General Accident Fire and Life Assurance Corp.,
175 W. Jackson Boulevard,
Chicago, Illinois.

Attention: Legal Department.

In Re: Theodore Tylke vs. Norwegian American
Hospital, Inc. Circuit Court No.
41-3-4965

Gentlemen:

By agreement between Thomas W. Morris, representing one of the defendants in this cause, John J. Sullivan, attorney representing Norwegian American Hospital and the writer, it was agreed that the above entitled cause might be dismissed and that thereafter a stipulation would be signed to reinstate this cause. This agreement was made in the presence of the Judge to whom such cause was assigned for trial.

Accordingly a stipulation to reinstate the cause was drawn in the latter part of July of 1942, which was signed by Thomas W. Morris, representing one of the defendants and the writer representing the plaintiffs and such stipulation was then forwarded to your office for signature on August 3, 1942. The stipulation was not returned to this office and thereafter the writer again wrote to Mr. Sullivan on October 15 and October 26, 1942, requesting that such stipulation be executed and returned to this office. At the present time I am still awaiting the return of the stipulation signed and I should appreciate your taking the necessary steps so to do, to the end that this cause might be reinstated in accordance with our agreement.

Will you kindly give this matter your attention.
Very truly yours,
Morris A. Hatt."

It was then alleged that in response to the foregoing letter Attorney Hatt received a letter from Attorney G. E. Hechler, the pertinent portions of which are as follows:

"Mr. Morris A. Hatt,
134 No. Dearborn Street,
Chicago, Illinois.

Dear Mr. Hatt:

Re: Theodore Tylke vs. Norwegian American
Hospital, Circuit Court No. 41-3-4965.

Your letter of December 30, to the General Accident Fire & Life Assurance Corporation has been referred to me. Mr. Sullivan who was formerly in charge of the law department of the company, entered the United States Naval Service on November 1. I have succeeded to his duties.

***

There is nothing in the file to indicate any agreement on the part of Mr. Sullivan to stipulate that the case might be reinstated, and in view of the fact that

the statute of limitations had not expired at that time, and the history of the matter on the trial, it would appear to be no reason why any such an agreement should have been made, and I am informed that Mr. Sullivan stated he had made no such an agreement.

I have nothing to guide me except the record as shown by the file, and there is nothing in that record which would justify me in taking any action at this time.

Yours very truly,
C. E. Heckler."

It was further alleged that "by telephone conversation had with the office of John J. Sullivan, who is now in the Armed Forces of the United States, your petitioner requested that there be returned to him the stipulation forwarded to the office which had been signed by Thomas M. Morris, but to the present time the attorney for the Norwegian American Hospital has refused and failed to return such stipulation;" that "such oral stipulation was entered into in good faith by all parties and should be enforced by this court;" and that "the statute of limitations of the State of Illinois now bars the plaintiffs from commencing a new suit and the petitioners only remedy is in having this Court execute and put into effect the stipulation entered into between the parties."

As heretofore shown defendant Hospital filed a motion to dismiss plaintiffs' motion to vacate the order of dismissal on the ground that the court lacked jurisdiction of the subject matter thereof and of said defendant.

On January 29, 1943 Attorney Heckler filed an affidavit in support of his motion to dismiss plaintiffs' petition to vacate, which, in addition to reiterating the statements made in his letter of January 7, 1943 to Attorney Haft, set forth the following telegram which the General Accident Fire & Life Assurance Corporation received from Attorney Sullivan on January 28, 1943: "I agreed to reinstate the case within the 30 day period but not after that time. I believe this case was reinstated in September 1942 and again dismissed at that time. The records should be checked on this. I

the statute of limitations had not expired at that time, and the history of the matter on the trial, it would appear to be no reason why any such an agreement should have been made, and I am informed that Mr. Sullivan stated he had made no such an agreement.

I have nothing to guide me except the record as shown by the file, and there is nothing in that record which would justify me in taking any action at this time.

Yours very truly,
O. E. Lessler."

It was further alleged that "by telephone conversation had with the office of John J. Sullivan, who is now in the Armed Forces of the United States, your petitioner requests that there be returned to him the stipulation forwarded to the office which had been signed by Thomas H. Morris, but to the present time the attorney for the Norwegian American Hospital has refused and failed to return such stipulation;" that "such oral stipulation was entered into in good faith by all parties and should be enforced by this court;" and that "the statute of limitations of the state of Illinois not bars the plaintiffs from commencing a new suit and the petitioners only remedy is in having this Court execute and put into effect the stipulation entered into between the parties."

As heretofore shown defendant Hospital filed a motion to dismiss plaintiffs' motion to vacate the order of dismissal on the ground that the court lacked jurisdiction of the subject matter thereof and of said defendant.

On January 29, 1943 Attorney Hoeksler filed an affidavit in support of his motion to dismiss plaintiffs' petition to vacate, which, in addition to reiterating the statements made in his letter of January 7, 1943 to Attorney Lett, set forth the following telegram which the General Accident Fire & Life Assurance Corporation received from Attorney Sullivan on January 28, 1943: "I agreed to reinstate the case within the 30 day period but not after that time. I believe this case was reinstated in September 1942 and again dismissed at that time. The records should be checked on this. I

offered $100 and the other defendant offered $50, and I am not sure whether I made any offer after Judge Daily denied their motion to strike our affirmative defense of charitable institution. I signed no stipulation and none was ever sent me for signature." On January 29, 1943 Attorney Heckler also filed the affidavit of one Mildred Border to the effect that she was in charge of the office records of Mr. Sullivan, the former attorney in this suit for defendant Hospital; that Attorney Sullivan entered the Naval service on November 1, 1942; that she had charge of the office docket and files in this case; and that "there was no record contained therein to stipulate to reinstate the case as alleged in the petition." Mildred Border also stated in this affidavit that "Mr. Sullivan was in Chicago on a short furlough during the Christmas holidays of 1942, and she mentioned to him that Mr. Haft claimed there had been an agreement to reinstate the suit, and that he was asking for a stipulation that the order of dismissal be vacated, and Mr. Sullivan informed affiant at that time that he had not made any agreement to reinstate the case, and Mr. Haft was asking for something he was not entitled to."

The inconsistency between Mildred Border's affidavit and Attorney Sullivan's telegram is immediately apparent. In her affidavit she states that Attorney Sullivan told her "during the Christmas holidays of 1942" that "he had not made any agreement to reinstate the case" and Attorney Sullivan in his telegram of January 28, 1943 states that he "agreed to reinstate the case within the 30 day period but not after that time."

The only question presented is whether the trial court had authority under section 72 of the Civil Practice Act to vacate the order of dismissal, which was entered more than 30 days prior to the filing of plaintiffs' motion to vacate such order. Section 72 of the Civil Practice Act (par. 196, chap. 110, Ill. Rev. Stat. 1941) provides in part as follows:

offered $100 and the other defendant offered $[illegible], and I am not sure whether I made any offer after Miller really denied their motion to strike our affirmative defense of charitable institution. I signed no stipulation and none was ever sent me for signature." On January 29, 1943 Attorney Roehler also filed the affidavit of one Mildred Torder to the effect that she was in charge of the office records of Mr. Sullivan, the former attorney in this suit for defendant Capital; that Attorney Sullivan entered the Naval service on November 1, 1942; that she had charge of the office docket and files in this case; and that "there was no record contained therein to stipulate to reinstate the case as alleged in the petition." Mildred Torder also stated in this affidavit that "Mr. Sullivan was in Chicago on a short furlough during the Christmas holidays of 1942, and she mentioned to him that Mr. Hart claimed there had been an agreement to reinstate the suit, and that he was asking for a stipulation that the order of dismissal be vacated, and Mr. Sullivan informed affiant at that time that he had not made any agreement to reinstate the case, and Mr. Hart was asking for something he was not entitled to."

The inconsistency between Mildred Torder's affidavit and Attorney Sullivan's telegram is immediately apparent. In her affidavit she states that Attorney Sullivan told her "during the Christmas holidays of 1942" that "he had not made any agreement to reinstate the case" and Attorney Sullivan in his telegram of January 28, 1943 states that he "agreed to reinstate the case within the 30 day period but not after that time."

The only question presented is whether the trial court had authority under section 72 of the Civil Practice Act to vacate the order of dismissal, which was entered more than 30 days prior to the filing of plaintiffs' motion to vacate such order. Section 72 of the Civil Practice Act (par. 199, chap. 110, Ill. Rev. Stat. 1941) provides in part as follows:

"Correction of Errors of Fact in Judicial Records. The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

It has been repeatedly held that errors of fact which may be assigned under the motion authorized by the foregoing section must be as to facts unknown to the court, which, if known, would have precluded the entry of the judgment order. (McCord v. Briggs & Turvis, 338 Ill. 158; Jacobson v. Ashkainaze, 337 Ill. 141; Cramer v. Ill. Commercial Men's Association, 176 Ill. App. 1; affirmed 260 Ill. 516; Weller & Sons v. Berry, 207 Ill. App. 165; Glaefkes v. Western Elec. Co., 145 Ill. App. 383.)

It appears conclusively from the record before us that when the case was dismissed for want of prosecution on June 30, 1942, it was with the clear understanding on the part of the trial judge and the attorneys for all the parties that said attorneys would thereafter sign a written stipulation that it might be reinstated after the expiration of 30 days from the date of the entry of such order of dismissal. Plaintiffs served no purpose of their own in agreeing that the case be dismissed for want of prosecution. Their agreement in that regard was merely a matter of accommodation to the defendant Margaret Amundson, who was desirous of entering the service of the United States Army as a nurse and could not do so while this litigation was pending against her. That plaintiffs agreed to the dismissal of this case for the reason indicated and that the attorneys for all the parties agreed in the presence of the trial judge that they would thereafter stipulate that the case might be reinstated is attested by Attorney Saks, Attorney Morris and Attorney Haft, who were present and represented all the parties except the Hospital at the time the agreement for the stipulation was made. In addition, the trial judge incorporated in his findings in his

"Correction of errors of fact. In judicial records, errors in fact, committed in the merely ministerial, and all of record, and which, by the common law, would have been corrected by a writ of error, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

It has been repeatedly held that errors of fact which may be assigned under the motion authorized by the foregoing section must be as to facts unknown to the court, which if known, would have precluded the entry of the judgment complained of. (Scord v. Bridges & Purvis, 330 Ill. 132; Jackson v. [illegible], 337 Ill. 141; Fraser v. Ill. Commercial Men's Association, 170 Ill. App. 1; affirmed 260 Ill. [illegible]; [illegible] v. Barney, 177 Ill. App. 165; Clarkson v. Western Pac. Co., 197 Ill. [illegible]).

It appears conclusively from the record before us that when the case was dismissed for want of prosecution on June 30, 1942, it was with the clear understanding on the part of the trial judge and the attorneys for all the parties that said attorneys would thereafter sign a written stipulation that it might be reinstated after the expiration of 30 days from the date of the entry of such order of dismissal. Plaintiffs acted no purpose of their own in agreeing that the case be dismissed for want of prosecution. Their presence in that regard was merely a matter of accommodation to the defendant Bergeret Jamieson, who was desirous of entering the service of the United States Army as a nurse and could not do so while this litigation was pending against her. That plaintiffs agreed to the dismissal of this case for the reason indicated and that the attorneys for all the parties agreed in the presence of the trial judge that they would thereafter stipulate that the case might be reinstated is attested by Attorney Kane, attorney Morris and attorney Smith, who were present and represented all the parties except the [illegible] at the time the agreement for the stipulation was made. In addition, the trial judge incorporated in his findings in his

order vacating the order of dismissal his own clear recollection of the circumstances under which the order of dismissal was entered, which was in accordance with the facts as alleged in plaintiffs' petition to vacate.

Could the foregoing facts be considered as errors of fact that would authorize the court to grant relief under Section 72 of the Civil Practice Act? The answer must be that they could not. Such facts were not unknown to the trial judge when he entered the order of dismissal. He was fully aware of the motives that prompted plaintiffs' agreement to permit the dismissal of the case for want of prosecution. He was present and heard the agreement made by the attorneys for all the parties, including Attorney John J. Sullivan for the Hospital, that they would thereafter stipulate that the case be reinstated after the expiration of more than 30 days from the date of the entry of the order of dismissal. The only circumstance, which was unknown to the trial judge and which he could not have known when he entered the order of dismissal, was the unpredictable refusal of Attorney Sullivan and his employer, the General Accident Fire & Life Assurance Corporation, to sign the stipulation to reinstate the case in accordance with Attorney Sullivan's agreement. The subsequent refusal of Attorney Sullivan and his employer to sign the stipulation to reinstate obviously could not be considered error as to an existing fact which, if known to the court, would have precluded the entry of the order of dismissal.

While the bad faith of Attorney Sullivan and his employer in refusing to sign the stipulation to reinstate the case and their violation of their agreement in that regard cannot be condoned, the trial court had no authority under section 72 of the Civil Practice Act to grant the relief requested by plaintiffs as against such refusal.

We are impelled to hold that the trial court had no jurisdiction to enter the order of January 29, 1943 vacating

order vacating the order of dismissal his own clear recollection of the circumstances under which the order of dismissal was entered, which was in accordance with the facts as alleged in plaintiffs' petition to vacate.

Could the foregoing facts be considered as errors of fact that would authorize the court to grant relief under section 72 of the Civil Practice Act? The answer must be that they could not. Such facts were not unknown to the trial judge when he entered the order of dismissal. He was fully aware of the motives that prompted plaintiffs' agreement to permit the dismissal of the case for want of prosecution. He was present and heard the agreement made by the attorneys for all the parties, including Attorney John J. Sullivan for the Capital, that they would thereafter stipulate that the case be reinstated after the expiration of more than 30 days from the date of the entry of the order of dismissal. The only circumstance, which was unknown to the trial judge and which he could not have known when he entered the order of dismissal, was the unpredictable refusal of Attorney Sullivan and his employer, the General Accident Fire & Life Assurance Corporation, to sign the stipulation to reinstate the case in accordance with Attorney Sullivan's agreement. The subsequent refusal of Attorney Sullivan and his employer to sign the stipulation to reinstate obviously could not be considered error as to an existing fact which, if known to the court, would have precluded the entry of the order of dismissal.

While the bad faith of Attorney Sullivan and his employer in refusing to sign the stipulation to reinstate the case and their violation of their agreement in that regard cannot be condoned, the trial court had no authority under section 72 of the Civil Practice Act to grant the relief requested by plaintiffs as against such refusal.

We are impelled to hold that the trial court had no jurisdiction to enter the order of January 29, 1941, vacating

the order of June 30, 1942, which dismissed the cause for want of prosecution.

The order of the Circuit court of Cook county of January 29, 1943 is reversed.

ORDER REVERSED.

Friend, P. J., and Scanlan, J., concur.

the order of June 20, 1942, which dismissed the cause for want of prosecution.

The order of the circuit court of Cook county of January 29, 1943 is reversed.

Order reversed.

Friend, P. J., and Lewis, J., concur.

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| DAVIS PERSONNEL SERVICE, INC., a corporation, Appellant, | ) | APPEAL FROM MUNICIPAL |
| v. | ) | COURT OF CHICAGO. |
| JOSEPHINE KASPER, Appellee. | ) | 322 I.A. 283 |

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Davis Personnel Service, Inc., confessed judgment for $82.50, which included attorney's fees of $25, against defendant, Josephine Kasper, on the latter's promissory note. Defendant's motion to open the judgment and for leave to defend was allowed. A trial was had before the court without a jury and finding and judgment were entered in favor of defendant. Plaintiff appeals from said judgment. Defendant filed no brief in this court.

Upon the trial plaintiff presented in evidence its note for $62.50 executed by defendant, said note containing a power of attorney to confess judgment and providing for reasonable attorney's fees of not less than $25.

Plaintiff is a private employment agency. July 28, 1942 defendant signed a written application requesting plaintiff to secure a position for her. Thereafter defendant entered into a written agreement with plaintiff which contained the following among other provisions:

> "The Applicant hereby agrees that in the event <u>she accepts a position</u>, obtained either directly or indirectly, through the efforts of the Company, within 750 days of date of execution of this Agreement, she shall pay to said Company for its services an amount as follows: *** 50% of one month's salary for positions paying $125.00 per month and up to but not including $150.00 per month." (Italics ours.)

On August 20, 1942 or the following day the employment agency directed defendant to call on Mr. Manzke of the personnel department of the Pure Oil Company for an interview in regard to a position with that company. On August 21,

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| DAVIS PERSONNEL SERVICE, INC., a corporation, Appellant, | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |
| v. | |
| JOSEPHINE KASPER, Appellee. | |

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Davis Personnel Service, Inc., confessed judgment for $82.50, which included attorney's fees of $25, against defendant, Josephine Kasper, on the latter's promissory note. Defendant's motion to open the judgment and for leave to defend was allowed. A trial was had before the court without a jury and finding and judgment were entered in favor of defendant. Plaintiff appeals from said judgment. Defendant filed no brief in this court.

Upon the trial plaintiff presented in evidence its note for $62.50 executed by defendant, said note containing a power of attorney to confess judgment and providing for reasonable attorney's fees of not less than $25.

Plaintiff is a private employment agency. July 28, 1942 defendant signed a written application requesting plaintiff to secure a position for her. Thereafter defendant entered into a written agreement with plaintiff which contained the following among other provisions:

> "The Applicant hereby agrees that in the event she accepts a position, obtained either directly or indirectly, through the efforts of the Company, within 750 days of date of execution of this Agreement, she shall pay to said Company for its services an amount as follows: *** 50% of one month's salary for positions paying $125.00 per month and up to but not including $150.00 per month." (Italics ours.)

On August 20, 1942 or the following day the employment agency directed defendant to call on Mr. Menke of the personnel department of the Pure Oil Company for an interview in regard to a position with that company. On August 21,

1942 the defendant, Miss Kasper, called on Manzke, upon whose request she filled out and signed a printed application form. In her application she stated that the "minimum salary expected" was $125 a month and that she "can come in two weeks." Manzke talked with her about her experience and qualifications and what positions he had available. Miss Kasper testified that Manzke did not tell her on the occasion of her interview with him that "she was hired" and that "she did not accept the position;" and that he did tell her, "We will talk it over and let Miss Green (of Personnel Service) know, and she will advise you." Later on the same day Miss Green of plaintiff company called defendant on the telephone and stated "The job is yours." According to defendant she told Miss Green at that time that she was undecided as to whether she would take the position and that she also told Miss Green the same thing in a telephone conversation the following day. After three or four more telephone calls from Miss Green defendant went to plaintiff's office on August 29, 1942, where she signed the aforesaid agreement, a wage assignment and the judgment note involved herein. The judgment note was payable in installments of $5 on August 29, 1942, $15 on September 15, 1942, $15 on September 30, 1942, $15 on October 15, 1942 and $12.50 on October 30, 1942. Miss Kasper paid the first installment of $5 at the time she signed the note. The installments on the note aggregate $62.50, which is 50% of one month's salary of $125, which amount she agreed to pay plaintiff in the event the latter procured a position for her which she accepted.

Defendant's own testimony shows conclusively that in response to her application therefor a position with the Pure Oil Company at $125 a month was tendered to her by plaintiff and that she definitely and formally accepted such position

1942 the defendant, Miss Kasper, called on Hanke, upon whose request she filled out and signed a printed application form. In her application she stated that the "minimum salary expected" was $125 a month and that she "can come in two weeks." Hanke talked with her about her experience and qualifications and what positions he had available. Miss Kasper testified that Hanke did not tell her on the occasion of her interview with him that "she was hired" and that "she did not accept the position;" and that he did tell her, "he will talk it over and let Miss Green (of Personnel Service) know, and she will advise you." Later on the same day Miss Green of plaintiff company called defendant on the telephone and stated "The job is yours." According to defendant she told Miss Green at that time that she was undecided as to whether she would take the position and that she also told Miss Green the same thing in a telephone conversation the following day. After three or four more telephone calls from Miss Green defendant went to plaintiff's office on August 29, 1942, where she signed the aforesaid agreement, a wage assignment and the judgment note involved herein. The judgment note was payable in installments of $5 on August 29, 1942, $15 on September 15, 1942, $15 on September 30, 1942, $15 on October 15, 1942 and $12.50 on October 30, 1942. Miss Kasper paid the first installment of $5 at the time she signed the note. The installments on the note aggregate $62.50, which is 50% of one month's salary of $125, which amount she agreed to pay plaintiff in the event the latter procured a position for her which she accepted.

Defendant's own testimony shows conclusively that in response to her application therefor a position with the Pure Oil Company at $125 a month was tendered to her by plaintiff and that she definitely and formally accepted such position -

when she signed the wage assignment and judgment note and paid $5 on account on the latter on August 29, 1942. Defendant admits that the position with the Pure Oil Company for which she applied was tendered to her and her sole defense was that she did not accept such position. Neither the fact that she was undecided as to whether she wanted the position before she formally accepted it nor the fact that she thereafter changed her mind and decided that she did not want it can avail her as a defense in view of her definite written acceptance. The very purpose of the provision of the agreement in question was to protect the employment agency as to its fee in the event a proferred position was accepted and thereafter the applicant changed her mind and refused to take it. Defendant apparently was fully cognizant of the terms of the agreement and we are not called upon to decide whether such terms are harsh or otherwise.

We are impelled to hold that the trial court erred in entering judgment in favor of defendant and for the reasons stated herein the judgment of the Municipal court of Chicago in favor of defendant is reversed and the cause is remanded with directions to confirm the judgment by confession entered in favor of plaintiff on October 19, 1942.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

when she signed the wage assignment and judgment note and paid $5 on account on the letter on August 29, 1942. Defendant admits that the position with the Pure Oil Company for which she applied was tendered to her and her sole defense was that she did not accept such position. Neither the fact that she was undecided as to whether she wanted the position before she formally accepted it nor the fact that she thereafter changed her mind and decided that she did not want it can avail her as a defense in view of her definite written acceptance. The very purpose of the provision of the agreement in question was to protect the employment agency as to its fee in the event a proferred position was accepted and thereafter the applicant changed her mind and refused to take it. Defendant apparently was fully cognizant of the terms of the agreement and we are not called upon to decide whether such terms are harsh or otherwise.

We are impelled to hold that the trial court erred in entering judgment in favor of defendant and for the reasons stated herein the judgment of the municipal court of Chicago in favor of defendant is reversed and the cause is remanded with directions to confirm the judgment by confession entered in favor of plaintiff on October 19, 1942.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

GEN NO. 9884 AGENDA NO. 35

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

322 I.A. 687

OCTOBER TERM, A. D. 1943

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| CROWLEY BROTHERS, inc., a corporation, Appellee vs. HENRY P. WARD, ET AL., HENRY P. WARD Appellant | APPEAL FROM CIRCUIT COURT OF PEORIA COUNTY. |

Per Curiam:

This is an appeal from a decree of the circuit court of Peoria County, foreclosing a mechanic's lien on appellant's premises at 416-418-420 Fulton Street in the City of Peoria, on which is located a two story brick building, the first story of which is used for business purposes, and the second story for apartments. Objections to the master's report were overruled, and stood as exceptions. The chancellor overruled the exceptions and found that appellee is entitled to a lien for $3,645.08, subject to the lien of an outstanding $22,000.00 trust deed, and to the inchoate right of dower of appellant's wife.

The street floor of the premises at No. 416, was occupied by a night club or tavern called "The Sportsman's Club." There is a stairway on the north, between 416 and 418. The street floor of 418-420 consists

CAN NO. 9904

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| CHICAGO SHOTTING, INC., a corporation, Appellee | |
| vs. | |
| HENRY F. VAND, ET AL., | |
| HENRY F. VAND Appellant | |

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Per Curiam:

This is an appeal from a decree of the circuit court of Cook County, foreclosing a mechanic's lien on appellant's premises at 418-420 Fulton Street in the City of Chicago, on which is located a two story brick building, the first story of which is used for gun purposes, and the second story for pool rooms. Objections to the master's report were overruled, and stood on exceptions. The chancellor overruled the exceptions and found that appellee is entitled to a lien for $3,643.05, subject to the lien of a mortgage for $20,000.00 trust deed, and to the inchoate right of dower of appellant's wife.

The street floor of the premises at no. 418, was occupied by a night club or tavern called "The Sportsman's Club." There is a entrance on the north, between 418 and 419. The street floor of 418-420 contains

of a large square room, a rectangular corner of which was used as a part of the night club. In the rear there is another room formed by bridging with a roof the rear wall of the front room and the side wall of the property to the rear. There is one apartment above the night club, and four others above 418-420, all reached by the stairway mentioned.

The first story of the premises at 418-420 had been previously leased as a combination garage and automobile showroom. The whole building was supplied with city heat, the facilities for which were inadequate and in bad repair. There is no basement under 418-420, the heating, plumbing and sewage facilities originating in the basement under 416. The single water supply for the entire building was a one-half inch pipe, the water for all tenants being measured by one meter, and was inadequate. The sewage facilities were in such a state of repair that the sewage ran over the floor instead of through the pipes. The steam supply and return equipment was a makeshift. The radiators leaked and the steam trap in the basement was in such poor condition that the representative of the company supplying the steam advised appellant the condition must be repaired at once or the steam would be shut off. There were no plumbing or sewage facilities in 418-420 except one toilet in the southeast corner of the main building, and no water, gas or sewage connection in the front part of the building.

On September 15, 1938 appellant leased the first story of 418-420, except the small room occupied by the night club, to A. C. Lasister for a "Merry-Go-Round" Restaurant, whereby a revolving counter belt conveyed the order of customers to the kitchen, and when filled, back to the customer. Lasister contracted with appellee, which is engaged in the plumbing business, to perform the plumbing and heating repairs and installations necessary to equip the restaurant. $2020.15 of the decree

of a large square room, a rectangular counter of which was used as a part of the night club. In the rear there is another room formed by bridging with a roof the rear wall of the front room and the side wall of the property to the rear. There is one apartment above the night club, and four others above 418-420, all reached by an exterior staircase.

The first story of the premises at 418-420 had been previously leased as a combination garage and automobile showroom. The single building was equipped with city heat, the facilities for which were inadequate and in bad repair. There is no basement under 418-420, the heating, plumbing and sewage facilities originating in the basement under 416. The single water supply for the entire building was a one-half inch pipe, the water for all tenants being measured by one meter, and was inadequate. The sewage facilities were in such a state of repair that the sewage ran over the floor instead of through the pipes. The steam supply and return equipment was inadequate. The radiators leaked and the steam trap in the basement was in such poor condition that the representative of the company supplying the steam advised stopping the condition must be repaired at once or the steam would be shut off. There were no plumbing or sewage facilities in 418-420 except one toilet in the southeast corner of the main building, and no water, gas or sewage connection in the front part of the building.

On September 16, 1930 applicant leased the first story of 418-420, except the small room occupied by the night club, to A. C. Lasister for a "Merry-Go-Round" Restaurant, whereby a revolving counter belt conveyed the order of customers to the kitchen, and when filled, back to the customer. Lasister contracted with appellee, which is engaged in the plumbing business, to perform the plumbing and heating repairs and installations necessary to equip the restaurant. §8020.15 of the sewers

represents work done on this account. $1020.00 represents other work done on the premises. The balance of the decree consists of interest on the two jobs from their respective dates of completion. Appellee claims and the decree finds that the work for Lasister was performed with the knowledge and consent of appellant, and that the other work was by his express authorization. Items of $28.65 and $13.89 for occupational sales tax in the respective claims of $2,048.70 and $1,033.89, were eliminated as not lienable. Appellant claims he is liable only for $239.00 for installation of a 1 1/4 inch water service pipe and certain sewage facilities, and items of extras admitted by him on the trial, aggregating a total of $587.01.

It appears from the testimony that prior to beginning any of the work, William A. Crowley, appellee's president, contacted appellant at Lasister's suggestion to get his approval for the installation of a sewer and water connection at 418-420. Crowley testified that appellant authorized him to go ahead, and the price was to be $239.99 plus sales tax; that he told appellant there would be other work coming up and in time, no doubt, the witness or somebody representing appellee, would have to come to appellant because they would have to determine who was going to pay for the additional work, as some of it would be for appellant and some of it for Lasister; that appellant replied: "That will take care of itself when it comes up."

Appellant testified that at this conversation Crowley said he had some work for Lasister which would cost $239.00; that he told Crowley that Lasister didn't have much money and it would cost $2000.00 to put in the restaurant, which the witness had required to be deposited in the bank in order for Lasister to get a lease, and that Crowley would have to work accordingly, because there was a great deal of other work to be done; that Crowley told him not to worry about that, and said:

represents work done on this account. $1075.[illegible] represents other work done on the premises. The balance of the decree consists of interest on the two jobs from their respective dates of completion. Appellee claims and the decree finds that the work for Lasiater was performed with the knowledge and consent of appellant, and that the other work was by his express authorization. Items of $[illegible].00 and $13.89 for occupational sales tax in the respective sums of $[illegible],048.70 and $1,083.89, were eliminated as not liquidable. Appellant claims he is liable only for $[illegible].00 for installation of a 1 1/4 inch water service pipe and certain sewage facilities, and items of extras admitted by him on the trial, aggregating a total of $[illegible].00.

It appears from the testimony that prior to beginning any of the work, William A. Crowley, appellee's predecessor, contacted appellant at Lasiater's suggestion to get his approval for the installation of a sewer and water connection at [illegible]. Crowley testified that appellant authorized him to go ahead, and the price was to be $[illegible].89 plus sales tax; that he told appellant there would be other work coming up and in time, no doubt, the witness or somebody representing appellee, would have to come to appellant because they would have to determine who was going to pay for the additional work, as some of it would be for appellant and some of it for Lasiater; that appellant replied: "I'll will take care of itself when it comes up."

Appellant testified that in this conversation Crowley said he had some work for Lasiater which would cost $[illegible].00; that he told Crowley that Lasiater didn't have much money and it would cost $[illegible].00 to put in the restaurant, which the witness had required to be deposited in the bank in order for Lasiater to get a lease, and that Crowley would have to work accordingly, because there was a great deal of other work to be done; that Crowley told him not to worry about that, and said:

"All I am looking to you for is $239.00"; and that if Lasister wanted anything else done he would do it for him; that he had done work for him before and Lasister had always paid him; that the witness told Crowley that he wished he would check the apartments upstairs and if anything was needed to recommend it and to give him a price on it; that Crowley said that while he was doing the work for Lasister he would do it; that he told Crowley that if he would wait sixty or ninety days he would pay the $239.99 and that Crowley submitted a bid in writing, and that the witness told him to go ahead. The bid was not introduced in evidence. Appellant further testified that he did not want any work done on the apartments, and later went to the building and found that Scheid, an employee of appellee, had put new faucets in an apartment; that he asked Scheid if the work was needed, and being told that the heaters were in bad shape, asked if they were worth fixing, and that Scheid said he didn't know; that he did not tell Scheid to go ahead with the work; that there were four hot water heaters in the apartments, one of which was taken out a few months after appellee worked on them, and the others at a later date; that a tank which heats water in the shed room was put in without his request and he did not know it was there until after it was installed; that he did not authorize the installation of forty-five feet of two-inch steam pipe and the only conversation he had about it was to tell Scheid that he wanted the heating system left alone, and had no conversation with Lasister about heat in the room he was going to use; that he did not know that any work was being done on the heaters in the apartments until he received the bill. He admitted that he went to the building about once a week and saw various men at work there.

Lasister operated the restaurant for a few months, forfeited his lease for non-payment of rent, and gave up possession in March, 1939.

"All I am looking to you for is $250.00"; and that if Lanister wanted anything else done he would do it for him; that he had done work for him before and Lanister had always paid him; that the witness told Crowley that [illegible] would do the apartments upstairs and if anything was needed in repairing it and to give him a price on it; that Crowley told him that he was doing the work for Lanister [illegible] of it; that he told Crowley that if he would wait ninety or ninety days he would pay the $250.00 and that Crowley submitted a bid in writing, and that the witness told him to go ahead. The bid was not introduced in evidence. Appellant further testified that he did not start any work done on the apartments, and later went to the building and found that Schmid, an employee of appellee, had put new faucets in an apartment; that he asked Schmid if the work was needed, and being told that the faucets were in bad shape, asked if they were worth fixing, and that Schmid said he didn't know; that he did not tell Schmid to go ahead with the work; that [illegible] apartments, one of which was taken out a few months after appellee worked on them, and the others at a later date; that a tank which made water in the shed room was put in without his request and he did not know it was there until after it was installed; that he did not authorize the installation of forty-five feet of two-inch brass pipe and the only conversation he had about it was to tell Dennis that he wanted the heating system left alone, and had no conversation with Lanister about heat in the room he was going to use; that he did not know that any work was being done on the heaters in the apartments until he received the bill. He admitted that he went to the building about once a week and saw various men at work there.

Lanister operated the restaurant for a few months, forfeited his lease for non-payment of rent, and gave up possession in March, 1915.

Somebody, whose identity is not shown, removed certain trade fixtures. The work and material for their installation represents $494.71 of the claim for lien. None of them, except a sink and counter for washing glasses was furnished by appellee. Since Lasister moved out, the restaurant premises have been occupied by a beauty culture school, and Lasister has been adjudged a bankrupt.

Scheid testified that appellant ordered him to do all the extra work done, and that all the plumbing and heating facilities installed are still in use, except the trade fixtures mentioned. The evidence shows that appellant gave Scheid the keys to the apartments, and on the trial he admitted liability for a part of thework. The testimony of five witnesses shows that appellant was frequently at the premises while the whole work, including that for Lasister, was being done, and made no protest about it, and said nothing to anybody to indicate he did not approve it, or that appellee should look only to Lasister. Crowley expressly denied that he told appellant that he would look solely to Lasister for work done on the restaurant. Some of the work was for the benefit of the whole building, such as the installation of an adequate water service pipe, which tends to corroborate Crowley. Lasister testified that shortly after he ceased operating the restaurant appellant told him that he, Lasister, had cost him (appellant) a lot of money, and said he was "stuck for at least $2000.00 on that job". Appellant admitted he might have made such a statement.

The master and the chancellor both found that appellant expressly authorized all the work done under the claim for $1020.00; that appellee did not agree to look solely to Lasister for the work done for him, and that appellant knowingly permitted that work to be done, without any objection thereto. Under the law such findings should not

somebody, whose identity is not known, received certain trade fixtures. The work and material for their installation represents $494.71 of the claim for lien. One of them, namely a sink and counter for washing glasses was furnished by appellee. When Lasiater moved out, the contract of purchase was completed by a beauty culture school, and Lasiater was then obliged to replace.

Schild testified that appellant promised him to do all the extra work done, and that all the plumbing and heating facilities installed are still in use, except the two fixtures mentioned. The evidence shows that appellant gave Schild the keys to the apartments, and on the trial he admitted liability for a part of the work. The testimony of five witnesses shows that appellant had frequently at the premises while the whole work, including that for Lasiater, was being done, and made no protest about it, and did nothing to anybody to indicate he did not approve it, or that anything or the work was to Lasiater. Crowley expressly denied that he told appellant that he would look solely to Lasiater for work done on the restaurant. Some of the work was for the benefit of the whole building, such as the installation of an adequate water service pipe, which tends to corroborate Crowley. Lasiater testified that shortly after he started operating the restaurant appellant told him that he, Lasiater, had cost him (appellant) a lot of money, and that he was "stuck for at least $2000.00 on that job". Appellant admitted he might have made such a statement.

The master and the chancellor both found that appellant expressly authorized all the work done under the claim for $1480.00; that appellee did not agree to look solely to Lasiater for the work done for him, and that appellant knowingly permitted that work to be done, without any objection thereto. Under the law such findings should not

be distrubed unless they are manifestly against the weight of the evidence, (Douglas Lumber Co. v. Home for Incurables, 380 Ill. 87; Pasedach v. Auw. 384 id. 491.) We are unable to say that the findings in this case are against the weight of the evidence.

It is well settled that under the provisions of section 1 of the Mechanics' Liens law, (Ill. Rev. Stat. 1941, chap. 82, par. 1), if an owner of property knowingly permits his tenant to contract for repairs and improvements thereto, the owner's interest is subjected to a lien for the labor and material furnished. (Haas Electric & Manufacturing Co. v. Springfield Amusement Park Co., 236 Ill 452; Loeff v. Meyer, 284 id. 114.)

The claim that appellee's proofs rest upon incompetent exhibits is without any merit. Appellee's foreman testified that the exhibits were prepared by the book-keeper from records and information furnished by the witness. He further testified that he knew that the various items of material shown by the exhibits were used to do the work, and testified at considerable length from his own personal knowledge concerning the work of installing them.

The testimony shows that the greater part of the $494.17, above mentioned, was for labor, and the balance for material, used in installing trade fixtures furnished by Lasister. All of such material was installed above the floor, none of it was of any benefit to the building, and none of it is now in use, but is gone. There is no showing that these items were intended by the parties to become a part of the premises. In the absence of such a showing they are not lienable. (McAlear v. New York Life Insurance and Trust Co., 177 Ill. App. 339; Daly v. Ling, 248 Id. 104.)

The decree is affirmed in all respects, except as to the sum of $494.17, concerning which sum the decree is reversed and the cause is remanded, with directions to modify the decree in accordance with the views herein expressed. Each party will pay one-half the costs in this court.

Affirmed in part; reversed in part and cause remanded.

be disturbed unless they are manifestly against the weight of the evidence. (Douglas Lumber Co. v. Ins. for Insurance, 280 Ill. 27; Paschoff v. Ins. 283 Ill. 481.) We are unable to say that the findings in this case are against the weight of the evidence.

It is well settled that under the provisions of sec. 1 of the Mechanics' Lien law, (Ill. Rev. Stat. 1941, chap. 82, par. 1), if an owner of property knowingly permits the tenant to contract for repairs and improvements thereto, the owner's interest is subjected to a lien for the labor and material furnished. (Kale Electric & Manufacturing Co. v. Springfield Masonic Temple Co., 238 Ill. 462; Loeff v. Meyer, 254 id. 114.)

The claim that appellee's proofs rest upon inadmissible and incompetent evidence is without any merit. Appellee's foreman testified that the exhibits were prepared by the book-keeper from records and information furnished by the foreman. The foreman testified that he knew that the various items of material shown on the exhibits were used to do the work, and testified to substantially details from his own personal knowledge concerning the work of installing them.

The testimony shows that the greater part of the $491.17, above mentioned, was for labor, and the balance for material, used in installing trade fixtures furnished by tenants. All of such material was installed above the floor, none of it was of any benefit to the building, and none of it is now in use, but is gone. There is no showing that these items were furnished by the parties to become a part of the premises. In the absence of such a showing they are not liable. (McAlister v. New York Life Insurance and Trust Co., 177 Ill. App. 339; Daly v. Mung, 242 id. 104.)

The decree is affirmed in all respects, except as to the sum of $491.17, concerning which the decree is reversed and the cause is remanded, with directions to modify the decree in accordance with the views herein expressed. Each party will pay one-half the costs in this court.

Affirmed in part; reversed in part and cause remanded.

322 I.A. 688

42475

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| THE PEOPLE OF THE STATE OF ILLINOIS, for the use of all taxpayers of the City of Chicago, by HARRY WOLFBERG, a taxpayer of said city, Appellant, | APPEAL FROM |
| v. | CIRCUIT COURT, |
| PETER J. BRADY, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, and FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, and CITY OF CHICAGO, Appellees. | COOK COUNTY. |

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Harry Wolfberg brought a taxpayer's suit against Peter J. Brady, former city clerk of the City of Chicago, United States Fidelity and Guaranty Company, Fidelity Deposit Company of Maryland, Fidelity and Casualty Company of New York, and the City of Chicago, to compel Brady to turn over to the city treasury all the compensation which he had received for issuing fishing and hunting licenses from April 9, 1931 until April 12, 1939, the period of his incumbency, and to enjoin the City of Chicago from instituting suit against Brady and effecting a compromise thereby. The several surety companies named as defendants had acted as sureties on Brady's bond during the time that he held office as city clerk.

The case was originally set on the contested motion calendar for hearing on motions to strike the original complaint and dismiss the suit, filed by certain of the respective defendants. An order was entered striking the original complaint and leave was granted plaintiff to file an amended complaint. When the amended complaint was subsequently filed, defendants lodged their respective motions to strike and dismiss the amended complaint, and the cause was set upon the contested motion calendar for October 27, 1941 and thereafter continued from time to time until it was specially set for hearing on February 2, 1942. On

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THE PROOFS OF THE RIGHT OF INTERVENTION,
for the use of all taxpayers of the
city of Chicago, by [illegible]
a taxpayer of said city,

appellant,

v.

FLORA J. BRADY, TERRY SPRUCE FIDELITY TRUST
AND DEPOSIT COMPANY, a corporation,
FIDELITY AND CASUALTY COMPANY OF NEW YORK,
LAND, a corporation, and FIDELITY AND
CASUALTY COMPANY OF NEW YORK, a cor-
poration, and CITY OF CHICAGO,

appellees.

MR. PRESIDING JUSTICE FRIEDMAN DELIVERED THE OPINION OF THE COURT.

Harry Goldberg brought a taxpayer's suit against Peter J. Brady, former city clerk of the city of Chicago, United States Fidelity and Guaranty Company, Fidelity Deposit Company of Maryland, Fidelity and Casualty Company of New York, and the city of Chicago, to compel Brady to turn over to the city treasury all the compensation which he had received for issuing fishing and hunting licenses from April 9, 1931 until April 12, 1933, the period of his incumbency, and to enjoin the city of Chicago from instituting suit against Brady and effecting a compromise thereby. The several surety companies named as defendants had acted as sureties on Brady's bond during the time that he held office as city clerk.

The case was originally set on the contested motion calendar for hearing on motions to strike the original complaint and dismiss the suit, filed by certain of the respective defendants. An order was entered striking the original complaint and leave was granted plaintiff to file an amended complaint. Then the amended complaint was accordingly filed, defendants lodged their respective motions to strike and dismiss the amended complaint, and the cause was set upon the contested motion calendar for October 27, 1941 and thereafter continued from time to time until it was specially set for hearing on February 2, 1942, on

that date it was continued to February 19, 1942. When the matter was called on the latter date plaintiff's counsel failed to appear and the record shows the following proceedings: "The Court: It was on February 2, 1942, and the Court has cleared its call for the purpose of this argument. It was counsel's motion. It went over the last time over the protest of all the counsel now here." Judge Harrington then stated that he would wait for plaintiff's counsel until 11:30 A.M. At that hour the matter was again called and counsel failing to appear, the court stated that "they have not seen fit to appear here this morning and although we have waited over an hour for them, the motion to strike the amended complaint and dismiss the cause is sustained."

Counsel for the respective parties indulge in a controversy as to whether the court dismissed the amended complaint for want of prosecution or upon the merits. The order of dismissal is rather vague, and while it appears from the proceedings had that the court intended to dismiss the cause for want of prosecution because of the failure of plaintiff's counsel to appear, the order indicates that the complaint was dismissed for want of equity, without consideration of the merits of the complaint.

This cause raises the identical questions presented in People v. Schreiber, No. 42267, the opinion in which is being concurrently filed. The only difference between the two cases is that the Schreiber proceeding was a mandamus instituted on behalf of the city against Schreiber to compel him to turn over to the city treasurer all the compensation he has received and will receive for issuing fishing and hunting licenses, whereas this proceeding is a taxpayer's suit to accomplish the same purpose against Brady, a former clerk. Our views and conclusions with respect to the questions raised in this proceed-

that date it was continued to February 13, 1942. When the matter was called on the latter date plaintiff's counsel failed to appear and the record shows the following proceedings: "The Court: It was on February 9, 1942, and the court has already its call for the purpose of this argument. It was counsel's motion. It went over the last time over the protest of all the counsel now here." Judge Darlington then stated that he would wait for plaintiff's counsel until 11:30 A.M. At that hour the matter was again called and counsel failing to appear, the court stated that "they have not been ill to appear here this morning and although we have waited over an hour for them, the motion to strike the amended complaint and dismiss the cause is sustained."

Counsel for the respective parties indulge in a controversy as to whether the court dismissed the amended complaint for want of prosecution or upon the merits. The order of dismissal is rather vague, but while it appears from the proceedings had that the court intended to dismiss the cause for want of prosecution because of the failure of plaintiff's counsel to appear, the order indicates that the complaint was dismissed for want of equity, without consideration of the merits of the complaint.

This cause raises the identical questions presented in People v. Schreiber, No. 44257, the opinion in which is being concurrently filed. The only difference between the two cases is that the Schreiber proceeding was a mandamus instituted on behalf of the city against Schreiber to compel him to turn over to the city treasurer all the compensation he has received and will receive for issuing fishing and hunting licenses, whereas this proceeding is a taxpayer's suit to accomplish the same purpose against Brady, a former clerk. The views and conclusions with respect to the questions raised in this proceed-

ing are fully set forth in People v. Schreiber and are controlling in this proceeding. However, since the court did not pass upon the matters, although the case was purportedly dismissed for want of equity, we consider it advisable to reverse the order and remand the cause with directions that an order be entered dismissing the amended complaint for want of equity.

The answer of the city in this cause raises the same questions of law that were raised by the motions to dismiss filed by the other defendants, and in addition thereto it avers that the suit was improperly brought because there is an adequate remedy at law, namely, mandamus, that a suit in equity for an accounting will not lie against a public officer when the amount alleged to be due is easily ascertainable, that no demand was served by the plaintiff on the corporation counsel to file suit, and that no facts were alleged which excused the making of a demand. In view of our conclusion as to the principal questions raised, it becomes unnecessary to consider these various contentions.

For the reasons indicated the order is reversed and the cause remanded with directions that an order be entered dismissing the complaint for want of equity.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

ing are fully set forth in Poole v. Gourstiger and are controlling in this proceeding. However, since the court did not pass upon the matters, although the case was purportedly dismissed for want of equity, we consider it advisable to reverse the order and remand the cause with directions that an order be entered dismissing the complaint for want of equity.

The answer of the city in this cause raises the same questions of law that were raised by the motions to dismiss filed by the other defendants, and in addition thereto it avers that the suit was improperly brought because there is an adequate remedy at law, namely, mandamus, that a suit in equity for an accounting will not lie against a public officer when the amount alleged to be due is readily ascertainable, that no demand was served by the plaintiff on the corporation counsel to file suit, and that no facts were alleged which excused the making of a demand. In view of our conclusion as to the principal questions raised, it becomes unnecessary to consider these various contentions.

For the reasons indicated the order is reversed and the cause remanded with directions that an order be entered dismissing the complaint for want of equity.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Heaslan and Sullivan, JJ., concur.

42866

HARRY O. OWEN,
Appellant,

v.

MATHIAS KLEIN & SONS,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

399 121

322 I.A. 680

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In an action in chancery for an accounting and discovery, the court entered a summary judgment in favor of defendant under the determinative procedure provided by section 57 of the Civil Practice Act (Ill. Rev. Stat. 1941, ch. 110, par. 181), which was amended to permit a defendant to employ the procedure under section 57 in a proper case, but decreed that plaintiff recover from defendant $145.32 and costs, which indebtedness was admitted by defendant. Plaintiff has taken an appeal from the decree or order entered.

In his original complaint at law filed June 27, 1942, plaintiff sought damages for an alleged breach of his employment contract, evidenced by a written resolution of defendant company dated June 2, 1937 and plaintiff's written acceptance of the terms thereof on the same date, as follows:

"It was thereupon moved by Mr. Wilson that Mr. H. O. Owen be appointed plant manager of this corporation, to have complete charge of operations and production, with power to employ and discharge plant employees, to report directly to the Board of Directors of this corporation; also that Mr. Owen's compensation as such plant manager be fixed at 1-3/4% of net sales of the corporation, the term of employment to be for a period of five years, and this employment to be effective upon written acceptance by Mr. Owen ***

"The Chairman thereupon appointed Mr. H. B. Wilson to interview Mr. Owen with a view to obtaining his acceptance of the said position on the terms aforesaid."

42866

HARRY O. OWEN,

Appellant,

v.

MATHIAS FLEIS & SONS, a corporation,

Appellee.

Appeal from Superior Court, King County.

Hon. Lowell Mallory, Judge.

Mr. Philip Lee Phillips [illegible] for the [illegible].

In an action in chancery for an accounting and discovery, the court entered a summary judgment in favor of defendant under the determinative procedure provided by section 27 of the Civil Practice Act (Ill. Rev. Stat. 1941, ch. 110, par. 101), which was amended to permit a defendant to employ the procedure under section 27 in a proper case, but denied that plaintiff recover from defendant $145.32 and costs, which indebtedness was admitted by defendant. Plaintiff has taken an appeal from the decree or order entered.

In his original complaint at law filed June 27, 1944, plaintiff sought damages for an alleged breach of his employment contract, evidenced by a written resolution of defendant company dated June 6, 1927 and plaintiff's written acceptance of the terms thereof on the same date, as follows:

"It was thereupon moved by Mr. Mathias that H. O. Owen be appointed plant manager of this corporation, to have complete charge of operations and production, with power to employ and discharge plant employees, to report directly to the Board of Directors of this corporation; also that H. Owen's compensation as such plant manager be fixed at 1-3/4% of net sales of the corporation, the term of employment to be for a period of five years, and this employment to be effective upon written acceptance by Mr. Owen ***

"The Chairman thereupon appointed Mr. M. M. Mathias to interview Mr. Owen with a view to obtaining his acceptance of the said position on the terms aforesaid."

"I hereby accept the appointment this day tendered me by your Board of Directors as Plant Manager of your company to have complete charge of operations with power to employ and discharge plant employees and to report directly to your Board of Directors. This appointment to be for a period of five years, and my compensation to be one and three-quarters per cent on net sales of the company."

Defendant admitted the terms of the written contract, but pleaded performance and acceptance of its terms by payment to plaintiff of one and three-quarters per cent of the net sales of the company during the five-year period of employment, and that from the outset of the employment the amount of net sales had been computed on the basis of invoices and shipments actually made from day to day during each particular salary month, and deduction therefrom of returns and allowances actually made from day to day during each particular month.

In his reply to defendant's answer plaintiff denied that at the outset of the employment, or at any other time, the net sales were computed on the basis of merchandise which had been invoiced and shipped during the monthly periods of employment, and also denied that during the first calendar month of his employment, from June 2, 1937 to and including June 30, 1937 the compensation under the employment agreement was fixed and computed on the basis of net sales as invoiced and shipped during the monthly period.

Thereupon interrogatories were filed by the plaintiff and answered in considerable detail by defendant, whose answers did not show the potential "back log" of unfilled orders as distinguished from net sales made during the period of employment. Defendant refused to answer further for the following reasons: (1) the contract did not provide for one and three-quarters per cent of unfilled orders, but of "net sales;" (2)

"I hereby accept the appointment this day tendered me by your Board of Directors as Plant Manager of your company to have complete charge of operations with power to employ and discharge plant employees and to report directly to your Board of Directors. This appointment to be for a period of five years, and my compensation to be one and three-quarters per cent on net sales of the company."

Defendant admitted the terms of the written contract, but pleaded performance and acceptance of its terms by payment to plaintiff of one and three-quarters per cent of the net sales of the company during the five-year period of employment, and that from the outset of the employment the amount of net sales had been computed on the basis of invoices and shipments actually made from day to day during each particular salary month, and deduction therefrom of returns and allowances actually made from day to day during each particular month.

In his reply to defendant's answer plaintiff denied that at the outset of the employment, or at any other time, the net sales were computed on the basis of merchandise which had been invoiced and shipped during the monthly periods of employment, and also denied that during the first calendar month of his employment, from June 2, 1927 to and including June 30, 1927 the compensation under the employment agreement was fixed and computed on the basis of net sales as invoiced and shipped during the monthly period.

Thereupon interrogatories were filed by the plaintiff and answered in considerable detail by defendant, whose answers did not show the potential "book log" of unfilled orders as distinguished from net sales made during the period of employment. Defendant refused to answer further for the following reasons: (1) the contract did not provide for one and three-quarters per cent of unfilled orders, but of "net sales;" (2)

plaintiff had already had full accounting and discovery of all matters to which he was entitled under his contract; and (3) it was impossible and impractical to specify the amounts of unfilled orders because such items were not priced and the books of the company were kept on the basis of net sales by invoice and shipment and not by potential orders. The court held that the contract did not include one and three-quarters per cent of the company's potential "back log" of orders, for which plaintiff claimed some $17,000 as additional compensation, and therefore it was not required, even if it could, to answer except in respect to "net sales" or invoices and shipments from day to day during the period of employment.

Subsequently on October 27, 1942 defendant filed its motion for summary judgment, and in support thereof attached affidavits which include all the 60 original salary checks paid to plaintiff during the five-year period of his employment,aggregating $67,953.33, and a full report and account of a firm of certified public accounts which showed that the amount of net sales and the compensation thereon from month to month had been fixed and computed on the basis of net sales actually made by invoice and shipment from month to month during each employment month, less actual returns and allowances on sales thus made from month to month during each employment month.

Plaintiff was then allowed fifteen days in which to file counteraffidavits to the defendant's motion for summary judgment, but elected instead to file an amended complaint in chancery for an accounting in which he again set forth the terms of the written contract evidenced by the resolution and plaintiff's acceptance thereof, pursuant to which he was appointed defendant's production manager. The sole difference between the two complaints was that in the suit at law plain-

plaintiff had already had full examination and discovery of all matters to which he was entitled under his contract; and (3) it was impossible and impractical to specify the amounts of unfilled orders because such items were not priced and the books of the company were kept on the basis of net sales by invoice and shipment and not by potential orders. The court held that the contract did not include one and three-quarters per cent of the company's potential "backlog" of orders, for which plaintiff claimed some $17,000 as additional compensation, and therefore it was not required, even if it could, to answer except in respect to "net sales" or invoices and shipments from day to day during the period of employment.

Subsequently on October 27, 1942 defendant filed its motion for summary judgment, and in support thereof attached affidavits which include all the 60 original salary checks paid to plaintiff during the five-year period of his employment, aggregating $27,223.33, and a full report and account of a firm of certified public accounts which showed that the amount of net sales and the computation thereon from month to month had been fixed and computed on the basis of net sales actually made by invoice and shipment from month to month during each employment month, less actual returns and allowances on sales thus made from month to month during each employment month.

Plaintiff was then allowed fifteen days in which to file counteraffidavits to the defendant's motion for summary judgment, but elected instead to file an amended complaint in chancery for an accounting in which he again set forth the terms of the written contract evidenced by the resolution and plaintiff's acceptance thereof, pursuant to which he was appointed defendant's production manager. The sole difference between the two complaints was that in the suit at law plain-

tiff sought damages for breach of contract and in his complaint in equity he sought an accounting and damages under the contract.

The gravamen of plaintiff's contention is that he is entitled to one and three-quarters per cent of all unpriced and unfilled orders and contracts to sell in accordance with requirements, whether for a period of five or ten years in advance, as, if and when such orders or contracts were filled and prices thereon fixed and determined by invoice and shipment, and he takes the position that his amended complaint in chancery and the counteraffidavits subsequently filed by him raise questions of fact which could not be passea upon by the motion judge in a summary manner.

Defendant, on the other hand, takes the position that within the undisputed terms of the agreement plaintiff was entitled to salary fixed at one and three-quarters per cent of the "net sales of the corporation" during the relevant period of his employment from June 2, 1937 to June 2, 1942; that except for the last two days of employment, the company's affirmative defense of payment was established by identification of all the canceled monthly salary checks and a report and account of auditors of the company's books, which showed that the amounts of such salary checks were fixed and determined from month to month on the basis of net sales, or the total amounts of invoices and shipments actually made during each calendar month, less returns and allowances; that the canceled checks and report and account were attached to affidavits of persons who were qualified to testify to the specifications of payment and were filed in support of the motion for summary judgment by defendant; that by proper affidavits of the secretary and bookkeeper, the company established that the June 1 and June 2, 1942 net sales amounted to $8,304.23 and that one and three-

tiff sought damages for breach of contract and in his complaint in equity he sought an accounting and damages under the contract.

The gravamen of plaintiff's contention is that he is entitled to one and three-quarters per cent of all imprinted and unfilled orders and contracts to sell in accordance with requirements, whether for a period of five or ten years in advance, as, if and when such orders or contracts were filled and prices thereon fixed and determined by invoice and shipment, and he takes the position that his amended complaint in chancery and the counter-affidavits subsequently filed by him raise questions of fact which could not be passed upon by the motion judge in a summary manner.

Defendant, on the other hand, takes the position that within the undisputed terms of the agreement plaintiff was entitled to salary fixed at one and three-quarters per cent of the "net sales of the corporation" during the relevant period of his employment from June 2, 1937 to June 2, 1942; that except for the last two days of employment, the company's affirmative defense of payment was established by identification of all the canceled monthly salary checks and a report and account of auditors of the company's books, which showed that the amounts of such salary checks were fixed and determined from month to month on the basis of net sales, or the total amounts of invoices and shipments actually made during each calendar month, less returns and allowances; that the canceled checks and report and account were attached to affidavits of persons who were qualified to testify to the specifications of payment and were filed in support of the motion for summary judgment by defendant; that by proper affidavits of the secretary and bookkeeper, the company established that the June 1 and June 2, 1942 net sales amounted to $2,304.23 and that one and three-

quarters per cent of that sum was $145.32, for which the court awarded plaintiff judgment against defendant; that plaintiff had his accountant and attorney examine the company's books and records but did not have them file counteraffidavits which contained any contradiction of the correctness of the matters specified in the detailed affidavits filed by defendant in support of its motion for summary judgment; that through a period of several months, during which the matter was before the trial court, plaintiff was given ample opportunity, by specific orders, to file such counteraffidavits of his accountant and persons who examined the company's books on his behalf, and if he had found any inaccuracy in the report and account of the independent firm of accountants which was of record, the motion for summary judgment would not have been sustained; that plaintiff could not avoid the legal effect of the motion for summary judgment properly supported by specific affidavits by (1) pleading in equity after he had already had an accounting and discovery in his lawsuit, or (2) by irrelevant generalities or statements of conclusion contained in counter-affidavits, since all the necessary evidentiary facts authorizing the judgment are contained in defendant's affidavits; that there was no real issue of fact involved, and if the case had been allowed to go to trial at law the court would have had to direct a verdict for defendant, or if allowed to go to hearing in chancery, a decree of dismissal for want of equity would have had to be entered for the defendant.

Aside from the generally accepted propositions urged that (1) "Equity has jurisdiction where complicated accounts are involved;" (2) "The trial court has no power to enter a summary judgment when disputed questions of fact are involved;" and (3) "On a motion by defendant for summary judgment, plaintiff's counter affidavits should be liberally construed,"

quarters per cent of that sum was $147,12, for which the court awarded plaintiff judgment against defendant; that plaintiff had his accountant and attorney examine the company's books and records but did not have them file counter-affidavits which contained any contradiction of the correctness of the matters specified in the detailed affidavits filed by defendant in support of its motion for summary judgment; that through a period of several months, during which the matter was before the trial court, plaintiff was given ample opportunity, by specific orders, to file such counter-affidavits of his accountant and persons who examined the company's books on his behalf, and if he had found any inaccuracy in the report and account of the independent firm of accountants which was of record, the motion for summary judgment could not have been sustained; that plaintiff could not avoid the legal effect of the motion for summary judgment properly supported by specific affidavits by (1) pleading in equity after he had already had an accounting and discovery in his lawsuit, or (2) by irrelevant generalities or statements of conclusion contained in counter-affidavits, since all the necessary evidentiary facts authorizing the judgment are contained in defendant's affidavits; that there was no real issue of fact involved, and if the case had been allowed to go to trial at law the court would have had to direct a verdict for defendant, or if allowed to go to hearing in chancery, a decree of dismissal for want of equity would have had to be entered for the defendant.

Aside from the generally accepted propositions urged that (1) "Equity has jurisdiction where complicated accounts are involved;" (2) "The trial court has no power to enter a summary judgment when disputed questions of fact are involved;" and (3) "On a motion by defendant for summary judgment, plaintiff's counter affidavits should be liberally construed,"

plaintiff relies on the legal proposition, as stated in his brief, that "where an employee enters into a contract with his employer, which provides that the employee is to receive, as compensation, a percentage of 'net sales,' said employee is entitled to receive compensation on all orders received and accepted during the term of his employment, provided said orders are actually filled, even though after the termination of his contract." (Mooar v. Wheeling Tile Co., 202 Ill. App. 278 (not reported in full), Sackett v. Centaur Motor Co., 189 Ill. App. 372, and several decisions in other states are relied upon to support this contention.

In the Mooar case plaintiff was employed to sell tile to be manufactured by defendant, and as compensation for his services he was to receive a certain percentage of the selling price of all "goods sold," including mail orders coming from his territory, whether solicited by him or not. Upon the termination of his contract plaintiff filed suit and attempted to recover compensation on all orders which had been received and accepted by defendant during the term of the contract, including orders which had not been delivered. The trial court entered judgment in plaintiff's favor and held that he was entitled to recover compensation on all orders which had been received and accepted by defendant regardless of whether or not they had been consummated by delivery. The Appellate court reversed the judgment and remanded the cause because the trial judge had permitted plaintiff to recover on unfilled orders, but in the course of its opinion held that "The termination of the contract of employment in no respect abrogates the liability of the defendant to account to plaintiff for commissions due him on the general orders accepted prior to such abrogation and afterward shipped, for plaintiff was entitled to receive his compensation on the tenth of each month for all tile shipped out during the preceding month, on orders taken by him or received through the mails from his territory, and

plaintiff relies on the legal proposition, as stated in his brief, that "where an employee enters into a contract with his employer, which provides that the employee is to receive, as compensation, a percentage of 'net sales,' said employee is entitled to receive compensation on all orders received and accepted during the term of his employment, provided said orders are actually filled, even though after the termination of his contract." (Moore v. Wheeling Tile Co., 108 Ill. App. 278 (not reported in full), Hagbert v. Gaughey Motor Co., 129 Ill. App. 372, and several decisions in other states are relied upon to support this contention.

In the Moore case plaintiff was employed to sell tile to be manufactured by defendant, and as compensation for his services he was to receive a certain percentage of the selling price of all "goods sold," including mail orders coming from his territory, whether solicited by him or not. Upon the termination of his contract plaintiff filed suit and attempted to recover compensation on all orders which had been received and accepted by defendant during the term of the contract, including orders which had not been delivered. The trial court entered judgment in plaintiff's favor and held that he was entitled to recover compensation on all orders which had been received and accepted by defendant regardless of whether or not they had been consummated by delivery. The Appellate court reversed the judgment and remanded the cause because the trial judge had permitted plaintiff to recover on unfilled orders, but in the course of its opinion held that "The termination of the contract of employment in no respect abrogates the liability of the defendant to account to plaintiff for commissions due him on the general orders accepted prior to such abrogation and afterward shipped, for plaintiff was entitled to receive his compensation on the tenth of each month for all tile shipped out during the preceding month, on orders taken by him or received through the mails from his territory, and

accepted by defendant, prior to the cancellation of the contract of employment," and plaintiff invokes this language as authority for his contention that he was entitled to recover under his written contract of employment one and three-quarters per cent on all orders received and accepted by defendant during the term of the contract, which were filled by defendant after the termination thereof. It may be conceded that a salesman who has earned a commission for procuring an order would have a cause of action for his percentage of that order as, if and when it became a consummated "sale," and whether he was with the company or not at the time of such sale would not be determinative of his right to a commission. However, if plaintiff's compensation in the case at bar, although determined on a commission basis, be regarded as a salary, as we think it should be, the facts in the Mooar case would bear no analogy to the contract before us, which provides compensation based on a percentage of "net sales of the corporation" for a fixed period of employment.

In the Sackett case plaintiff was employed for an indefinite term at a salary of $25 per week and one per cent of the gross sales of the automobiles "sold through this office." A supplemental contract provided that plaintiff should receive "one-half of 1 per cent. on all cars going into the State of Wisconsin on and after this date." It appeared that on the date of the supplemental contract defendant entered into an agreement with a Milwaukee company for the sale and purchase of 250 cars. Defendant discharged plaintiff and thereafter delivered to the Milwaukee company 27 cars. The trial court held that plaintiff was entitled to compensation on the cars delivered, and the judgment was affirmed upon the theory that he was entitled to the commissions on the cars sold through defendant's office under arrangements effected while he was in defendant's employ. There again the court had before it the

accepted by defendant, prior to the cancellation of the contract of employment," and plaintiff therefore sues in assumpsit for his compensation that he was entitled to receive under his written contract of employment one and three-quarters per cent on all orders received and accepted by defendant during the term of the contract, which were filled by defendant after the termination thereof. It may be conceded that a salesman who has earned a commission for procuring an order would have a cause of action for his percentage of that order as, if and when it becomes a consummated "sale," and whether he was with the company or not at the time of such sale would not be determinative of his right to a commission. However, if plaintiff's contention in the case at bar, although described on a commission basis, be regarded as a salary, as it might it should be, the facts in the Moser case would bear no analogy to the contract before us, which provides compensation based on a percentage of "net sales of the corporation" for a fixed period of employment.

In the Hassett case plaintiff was employed for an indefinite term at a salary of $75 per week and one per cent of the gross sales of the automobiles "sold through this office," the applicable contract provided that plaintiff should receive "one-half of 1 per cent, on all cars going into the state of Wisconsin on and after this date." It appeared that on the date of the employmental contract defendant entered into an agreement with a Milwaukee company for the sale and purchase of 250 cars. Defendant discharged plaintiff and thereafter delivered to the Milwaukee company 77 cars. The trial court held that plaintiff was entitled to compensation on the cars delivered, and the judgment was affirmed upon the theory that he was entitled to the commissions on the cars sold through defendant's office under arrangements already made while he was in defendant's employ. There again the court had before it the

case of a salesman suing for a commission, but the question of "net sales" was not involved. The plaintiff was employed for an indefinite term and the court did not interpret net sales or even gross sales.

The cases outside of Illinois, upon which plaintiff relies, also deal with commissions claimed by salesmen after the termination of their respective contracts, for sales made while they were still employed (Myers v. J. Wiss & Sons Co., 118 Atl. 450; Barilleau v. Paquet, 159 So. 418; Ohio Marble Co. v. Byrd, 65 Fed. 2d 98.) None of these cases involve a determination of the amount of salary during the period of the employment by a computation of a percentage of the "net sales" of the corporation.

In the case at bar plaintiff was defendant's production manager; he was a so-called efficiency expert who had, prior to his employment by the company, charged $50 a day for his services; he had nothing whatsoever to do with the sales department or the procurance of orders, and his duties and responsibilities as production manager did not have any connection with, nor were they dependent upon, the procurance of any order or contract to sell. Instead of a straight salary, his compensation was based on the net sales of the company, an arrangement undoubtedly made to induce greater effort on his part in managing the plant and thus increase the efficiency and profit of the entire business. Such an agreement has no analogy to the cases of salesmen claiming commissions for sales made by them or to be credited to their accounts from territory within their jurisdiction. None of the cases cited by plaintiff holds that the net sales of a company, made from day to day, during any particular period include the unfilled orders of the company, and as counsel for defendant suggests, it would be a strange method of bookkeeping if a company allowed itself, at the end of each month, to figure the amount of work done by way of net sales by a computation of the orders, filled and unfilled, which it received. In

case of a salesman suing for a commission, but the question of "net sales" was not involved. The plaintiff was employed for an indefinite term and the court did not interpret net sales or even gross sales.

The other cases of Illinois, upon which plaintiff relies, also deal with commissions claimed by salesmen after the termination of their respective contracts, for sales made while they were still employed (Byers v. C. Tiss & Sons Co., 112 Ill. 47; Bartlinson v. Lamont, 177 Ill. 81; Ohio Brewing Co. v. Ayre, 42 Ind. App. 92.) Some of these cases involve a determination of the amount of salary during the period of the employment by a computation of a percentage of the "net sales" of the corporation.

In the case at bar plaintiff was department's production manager; he was a so-called efficiency expert who had, prior to his employment by the company, charged $50 a day for his services; he had nothing whatsoever to do with the sales department or the procurance of orders, and his duties and responsibilities as production manager did not have any connection with, nor were they dependent upon, the procurance of any order or contract to sell. Instead of a straight salary, his compensation was based on the net sales of the company, an arrangement undoubtedly made to induce greater effort on his part in managing the plant and thus increase the efficiency and profit of the entire business. Such an agreement has no analogy to the cases of salesmen claiming commissions for sales made by them or to be credited to their accounts from territory within their jurisdiction. Some of the cases cited by plaintiff make that the net sales of a company, made from day to day, during any particular period include the unfilled orders of the company, and as counsel for defendant suggests, it would be a strange method of bookkeeping if a company allowed itself, at the end of each month, to figure the amount of work done by way of net sales by a computation of the orders, filled and unfilled, which it received. In

the case at bar the facts indicate that such a method of bookkeeping was not followed because the orders were not priced. According to the affidavits and records filed in support of the motion for summary judgment, the method of determining the amount of net sales was to take the total number of sales completed by invoice and shipment during that specific month and deduct therefrom the returns and allowances of merchandise for that month. Plaintiff, who was in charge of the operations of the defendant company, was undoubtedly aware of this practice when he accepted the monthly checks of the company. However, plaintiff contended before the trial court that instead of determining net sales from month to month on the basis of completed sales by invoice and shipment, a method which defendant had consistently followed as indicated by its records, defendant should be required to specify the aggregate amount of unfilled orders and contracts for sales of merchandise which had been received for the entire five-year period. That was the purpose of the interrogatories filed by plaintiff before defendant's motion for summary judgment was made. By those interrogatories plaintiff apparently sought to establish that the amount of his salary check should be computed on the basis of "orders" and "contracts for sale of merchandise," rather than upon completed "net sales" of the company from month to month. We think the court properly ruled that the contract and the practice to which plaintiff had consented, were not susceptible to such interpretation.

The gist of the controversy really resolves itself into a question of law. If the trial court was correct in holding that plaintiff's compensation was in the nature of a salary, that he had during the entire five-year period received and accepted checks computed upon the basis of net sales by the method employed by defendant, and that he was not entitled to

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The gist of the controversy really resolves itself into a question of law. If the trial court was correct in holding that plaintiff's compensation was in the nature of a salary, that he had during the entire five-year period received and accepted checks computed upon the basis of net sales by the method employed by defendant, and that he was not entitled to

a percentage of all unpriced and unfilled orders and contracts to sell in accordance with requirements, then there was no triable issue of fact for the court to determine. The canceled checks and the report and account of auditors of the company attached to defendant's affidavits, showing that the amounts of the salary checks were fixed and determined from month to month on the basis of net sales for the total amount of invoices and shipments actually made during each calendar month, presented uncontroverted evidentiary facts authorizing a judgment under the construction of the contract in controversy; and under that construction the court would have been required to direct a verdict for defendant if the cause had proceeded to trial at law, or enter a decree of dismissal for want of equity if it had allowed the cause to go to hearing in a chancery proceeding. The counteraffidavits ultimately filed by plaintiff merely questioned the manner by which net sales had been determined, but none of the specific items in the report and account of the auditors were denied. The detailed report and account of the auditors showed the precise manner in which the defendant arrived at the amount of net sales, and as previously indicated plaintiff, who had charge of operations and production of defendant company during the five-year period of his employment and was therefore presumably familiar with the method employed, was not in a position to disclaim knowledge of the manner in which his monthly salary checks had been computed upon the basis of net sales, after accepting checks which ran into a very substantial amount during 60 consecutive months. It is futile for him now to contend that his compensation was based on the unfilled or unpriced orders or contracts for sales of merchandise because an examination of the records indicates the contrary.

Accordingly we are of opinion that the court properly entered summary judgment for defendant, and it is therefore affirmed. JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

a percentage of all unpriced and unfilled orders and contracts to sell in accordance with requirements, then there was no triable issue of fact for the court to determine. The canceled checks and the report and account of auditors of the company attached to defendant's affidavits, showing that the amounts of the salary checks were fixed and determined from month to month on the basis of net sales for the total amount of invoices and shipments actually made during each calendar month, presented uncontroverted evidentiary facts authorizing a judgment under the construction of the contract in controversy; and under that construction the court would have been required to direct a verdict for defendant if the cause had proceeded to trial at law, or enter a decree of dismissal for want of equity if it had allowed the cause to go to hearing in chancery proceeding. The counteraffidavits ultimately filed by plaintiff merely questioned the manner by which net sales had been determined, but none of the specific items in the report and account of the auditors were denied. The detailed report and account of the auditors showed the precise manner in which the defendant arrived at the amount of net sales, and as previously indicated plaintiff, who had charge of operations and production of defendant company during the five-year period of his employment and was therefore presumably familiar with the method employed, was not in a position to disclaim knowledge of the manner in which his monthly salary checks had been computed upon the basis of net sales, after accepting checks which ran into a very substantial amount during so consecutive months. It is futile for him now to contend that his compensation was based on the unfilled or unpriced orders or contracts for sales of merchandise because an examination of the records indicates the contrary.

Accordingly we are of opinion that the court properly entered summary judgment for defendant, and it is therefore affirmed.

JUDGMENT AFFIRMED.

Cooper and Sullivan, JJ., concur.

42971

NOVEL LEON REIGER,
Appellee,

v.

WALTER BRUCE,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

322 I.A. 689

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, Novel Leon Reiger, brought proceedings against Walter Bruce under the fourth provision of section 2 (paragraph 2) of the Forcible Entry and Detainer Act, chapter 57, Illinois Revised Statutes 1943, for the possession of a six-room apartment in a building known as 6021 South Vernon avenue, Chicago. Upon trial the court found that defendant was guilty of unlawfully withholding from plaintiff the possession of the premises described in the complaint, that the right to possession was in plaintiff, and judgment was entered accordingly, from which defendant appeals.

It appears from the evidence that on May 1, 1942 Jessie Reiger, plaintiff's wife, entered into a written lease for the apartment with Walter Bruce, which expired April 30, 1943. The stipulated rental was $65 a month. Before the expiration of the lease Bruce entered the armed services, and after his departure his cousin, Montel Ward, remained in possession. The rooms were sublet to some six or seven different persons who paid rentals to Mrs. Ward, varying from one dollar a night to five dollars a week. Shortly before the expiration of the lease, plaintiff served notice for possession of the apartment on Mrs. Ward, and about two months thereafter brought forcible detainer proceedings against her and Bruce. The defense interposed was that Bruce had been released from the armed forces and had returned to Chicago, and since the lease was in his name the action should proceed against him. Judge Heller of the Municipal court sustained that defense in his

42971

NOVAL LEON SEIGER,

Appellee,

v.

WALTER BRUCE,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE WILETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, Noval Leon Seiger, brought proceedings against Walter Bruce under the fourth provision of section 2 (paragraph 2) of the Forcible Entry and Detainer Act, chapter 57, Illinois Revised Statutes 1943, for the possession of a six-room apartment in a building known as 6041 South Vernon avenue, Chicago. Upon trial the court found that defendant was guilty of unlawfully withholding from plaintiff the possession of the premises described in the complaint, that the right to possession was in plaintiff, and judgment was entered accordingly, from which defendant appeals.

It appears from the evidence that on July 1, 1942 Jessie Rodger, plaintiff's wife, entered into a written lease for the apartment with Walter Bruce, which expired April 30, 1943. The stipulated rental was $65 a month. Before the expiration of the lease Bruce entered the armed services, and after his departure his cousin, Muriel Ward, remained in possession. The rooms were sublet to some six or seven different persons who paid rentals to Mrs. Ward, varying from one dollar a night to five dollars a week. Shortly before the expiration of the lease, plaintiff served notice for possession of the apartment on Mrs. Ward, and about two months thereafter brought forcible detainer proceedings against her and Bruce. The defense interposed was that Bruce had been released from the armed forces and had returned to Chicago, and since the lease was in his name the action should proceed against him. Judge Miller of the municipal court sustained that defense in his

ruling and accordingly refused to enter judgment for possession in favor of plaintiff, and no adjudication was had in that case. Subsequently the instant proceeding was started by Reiger against Bruce, after the third notice of termination had been served on July 31, 1943 on Mrs. Ward as a member of the household in possession of the apartment. It was plaintiff's plan to remodel the entire building into one-room units, and he had filed a petition with the Office of Price Administration in Chicago to secure permission and authority to make the improvements and to receive allotment by the War Production Board of controlled materials necessary for that purpose. Documentary proof to show that permission and the necessary allotment had been granted, was introduced and received in evidence.

When the cause was tried, defendant took the position, and he argues on appeal, (1) that the lease was entered into by Bruce with Jessie Reiger, who is not the plaintiff in this proceeding; (2) that subsequent to the expiration of the lease on April 30, 1943 defendant paid his rent to the landlord in May, June and July and tendered his rent in August of that year, by reason whereof there was a hold-over tenancy from year to year; (3) that with respect to the subletting of the premises to roomers in violation of the terms of the lease, the landlord was obliged to first serve notice of his objection to such use of the premises before he could avail himself of that ground as a violation; and (4) that plaintiff failed to show that the alterations contemplated were of such a substantial nature that they could not be made while the tenants were in possession.

With respect to the first contention, it was shown upon the hearing that Novel Leon Reiger and his wife were owners of the premises as joint tenants. Forcible detainer being merely

ruling and accordingly refused to enter judgment for possession in favor of plaintiff, and no adjudication was had in that case. Subsequently the instant proceeding was started by Reiger against Grace, after the third notice of termination had been served on July 31, 1943 on Mrs. Grad as a member of the household in possession of the apartment. It was plaintiff's plan to remodel the entire building into one-room units, and he had filed a petition with the Office of Price Administration in Chicago to secure permission and authority to make the improvements and to receive allotment by the War Production Board of controlled materials necessary for that purpose. Documentary proof to show that permission and the necessary allotment had been granted, was introduced and received in evidence.

When the cause was tried, defendant took the position, and he argues on appeal, (1) that the lease was entered into by Grace with Jessie Reiger, who is not the plaintiff in this proceeding; (2) that subsequent to the expiration of the lease on April 30, 1943 defendant paid his rent to the landlord in May, June and July and tendered his rent in August of that year, by reason whereof there was a hold-over tenancy from year to year; (3) that with respect to the subletting of the premises to tenants in violation of the terms of the lease, the landlord was obliged to first serve notice of his objection to such use of the premises before he could avail himself of that ground as a violation; and (4) that plaintiff failed to show that the alterations contemplated were of such a substantial nature that they could not be made while the tenants were in possession.

With respect to the first contention, it was shown upon the hearing that Novel Leon Reiger and his wife were owners of the premises as joint tenants. Possible detainer being merely

a possessory action, one joint tenant may sue and recover the joint property, and if one of two joint tenants executes a lease without the participation of the other it will be deemed to be for the benefit of both. A similar question arose in Kelly v. Parker, 221 Ill. App. 273, and the same contention was there made, but the court held "that one tenant in common or one joint tenant may have his remedy for the whole property against a party having no right in the premises without joining the other joint tenants or tenants in common." In support of that conclusion the court cited 19 Cyc. 1141, wherein it is said: "There can be no doubt but that tenants in common of the whole estate may join in summary proceedings to recover its possession. And it has repeatedly been held that one tenant in common may maintain the action against a stranger without joining his co-tenants as plaintiffs."

With respect to the contention that the payment and acceptance of rent for three months after the expiration of the written lease constituted a tenancy from year to year, it appears that Reiger served notice for possession of the premises on Mrs. Ward shortly before the lease expired, and had instituted forcible detainer action early in July 1943 in which, as stated above, no adjudication was had. Therefore this proceeding was subsequently filed, and meanwhile rents for May, June and July 1943 were paid by Bruce and accepted by Reiger. The plaintiff testified that he again, on July 31, served notice for possession of the premises on Mrs. Ward, and the court expressed the opinion that such notice had been served on her on that date, notwithstanding her denial thereof. During all that period Mrs. Ward undoubtedly knew that the landlord did not intend to allow Bruce to remain on the premises for another year, and since

a possessory action, one joint tenant may sue and recover the joint property, and if one of two joint tenants executes a lease without the participation of the other it will be deemed to be for the benefit of both. A similar question arose in Kelly v. Parker, 221 Ill. 279, and the same contention was there made, but the court held "that one tenant in common or one joint tenant may have his remedy for the whole property against a party having no right in the premises without joining the other joint tenants or tenants in common." In support of that contention the court cited 19 Cyc. 1441, wherein it is said: "There can be no doubt but that tenants in common of the whole estate may join in summary proceedings to recover its possession, and it has repeatedly been held that one tenant in common may maintain the action against a stranger without joining his co-tenants as plaintiffs."

With respect to the contention that the payment and acceptance of rent for three months after the expiration of the written lease constituted a tenancy from year to year, it appears that Reiger served notice for possession of the premises on Mrs. Ward shortly before the lease expired, and had instituted forcible detainer action early in July 1943 in which, as stated above, no adjudication was had. Therefore this proceeding was subsequently filed, and nonwithstanding rents for May, June and July 1943 were paid by Mrs. Ward and accepted by Reiger. The plaintiff testified that he again, on July 31, served notice for possession of the premises on Mrs. Ward, and the court expressed the opinion that such notice had been served on her on that date, notwithstanding her denial thereof. During all that period Mrs. Ward undoubtedly knew that the landlord did not intend to allow Bruce to remain on the premises for another year, and since

she was in possession of the apartment, collecting rents from the subtenants on behalf of Bruce, as she stated, he was presumably apprised of that fact. He had been released from the army and upon his return to Chicago in May 1943 claims to have lived in the apartment up to the time this suit was instituted, but Reiger was unable to serve notice upon him there.

Defendant urges that the landlord was obliged to first serve notice of his objection to the subletting of the premises to roomers in violation of the terms of the lease. The written indenture of lease provided that the apartment was leased to Bruce "for a private dwelling" and further provided specifically that it "shall not be occupied in whole or in part by any person other than Lessee, and Lessee shall not sublet the same or any part thereof ***; nor offer for lease or sublease the said premises, nor any portion thereof, without, in each case, the consent in writing of Lessor;" and there is the further provision that "said premises, or any part thereof, shall not be used or occupied for boarding or lodging house, nor for rooming *** purposes." The evidence discloses without question that both these provisions of the lease were violated and that no consent in writing of the lessor was obtained to use the premises otherwise than in accordance with the provisions of the lease. Therefore, even if there had been a holdover, as defendant contends, plaintiff was entitled to terminate the lease and obtain possession of the apartment because of the use to which the premises had been put.

The remaining contention is that plaintiff failed to show that the improvements could not be made while the tenants were in possession. The specifications for alteration work, which were introduced in evidence upon the court's request, show that the alterations contemplated were of a

she was in possession of the apartment, collecting rents from the subtenants on behalf of Grace, as she stated, he was presumably apprised of that fact. He had been released from the army and upon his return to Chicago in May 1943 claims to have lived in the apartment up to the time this suit was instituted, but Reiger was unable to serve notice upon him there.

Defendant urges that the landlord was obliged to first serve notice of his objection to the subletting of the premises to roomers in violation of the terms of the lease. The written indenture of lease provided that the apartment was leased to Grace "for a private dwelling" and further provided specifically that it "shall not be occupied in whole or in part by any person other than Lessee, and Lessee shall not sublet the same or any part thereof ***; nor offer for lease or sublease the said premises, nor any portion thereof, without, in each case, the consent in writing of Lessor;" and there is the further provision that "said premises, or any part thereof, shall not be used or occupied for boarding or lodging house, nor for rooming *** purposes." The evidence discloses without question that both these provisions of the lease were violated and that no consent in writing of the lessor was obtained to use the premises otherwise than in accordance with the provisions of the lease. Therefore, even if there had been a holdover, as defendant contends, plaintiff was entitled to terminate the lease and obtain possession of the apartment because of the use to which the premises had been put.

The remaining contention is that plaintiff failed to show that the improvements could not be made while the tenants were in possession. The specifications for alteration work, which were introduced in evidence upon the court's request, show that the alterations contemplated were of a

substantial nature and included installation of partition walls to be furred, lathed and covered with plaster, with doors installed therein, the closing off of bedrooms, the breaking of openings between rooms, opening the soil and sink stacks and installing all necessary rough plumbing, inclusive of hot and cold water lines and gas lines, installation of new bathtubs, wall-type lavatories, kitchen sinks, openings for windows in the new bathrooms, electrical wiring and other material changes which would make it impossible for tenants to continue the occupation of the apartment while the work was going on.

Much of the evidence adduced upon the hearing is not abstracted, and we have been obliged to read and study the entire record in the case to determine the facts and issues involved. From such an examination we are impelled to hold that the court properly entered the judgment for possession in favor of plaintiff, and it is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

substantial nature and included installation of partition walls to be furred, lathed and covered with plaster, with doors installed therein, the closing off of bedrooms, the breaking of openings between rooms, opening the wall and sink stacks and installing all necessary rough plumbing, including of hot and cold water lines and gas lines, installation of new bathtubs, wall-type lavatories, kitchen sinks, openings for windows in the new bathrooms, electrical wiring and other material changes which would make it impossible for tenants to continue the occupation of the apartment while the work was going on.

Much of the evidence adduced upon the hearing is not abstracted, and we have been obliged to read and study the entire record in the case to determine the facts and issues involved. From such an examination we are impelled to hold that the court properly entered the judgment for possession in favor of plaintiff, and it is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

42115

In Re ESTATE OF HUGH McLENNAN, Deceased.

B. K. GOODMAN, (Petitioner) Appellant,

v.

KATHERINE HOWELL McLENNAN, Executrix under the Last Will and Testament of Hugh McLennan, Deceased, (Respondent) Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

401 123

322 I.A. 690

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

B. K. Goodman filed a petition in the Probate court of Cook County against Katherine Howell McLennan, Executrix under the Last Will and Testament of Hugh McLennan, Deceased, by which he sought to recover certain certificates from the executrix which the latter had in her possession and which she claimed to be a part of the estate of McLennan. The executrix, as respondent, filed an answer to the petition and there was a hearing before the judge of the Probate court. Petitioner offered evidence in support of the petition, but respondent offered no evidence, contending that the case made out by petitioner was insufficient to justify a finding in his favor. A decretal judgment was entered in favor of petitioner which directed the executrix to turn over and deliver to him the certificates in question. An appeal was taken by respondent to the Circuit court, where there was a trial de novo before the court and a jury and a verdict was returned against petitioner and in favor of the executrix. The trial court denied petitioner's motion for a new trial and entered an order dismissing petitioner's petition as amended. Petitioner appeals.

The verified petition filed in the Probate court is as follows:

"Your petitioner, B. K. Goodman, * * * respectfully

In Re ESTATE OF [illegible],
Deceased.

B. K. GOODMAN,
(Petitioner) Appellant,

v.

KATHERINE HOWELL [illegible],
Executrix under the last will
and Testament of Hugh [illegible],
Deceased,
(Respondent) Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

B. K. Goodman filed a petition in the Probate court of Cook County against Katherine Howell [illegible], executrix under the last will and Testament of Hugh [illegible], Deceased, by which he sought to recover certain certificates from the executrix which the latter had in her possession and which she claimed to be a part of the estate of [illegible]. The executrix, as respondent, filed an answer to the petition and there was a hearing before the judge of the Probate court. Petitioner offered evidence in support of the petition, but respondent offered no evidence, contending that the case made out by petitioner was insufficient to justify a finding in his favor. A decretal judgment was entered in favor of petitioner which directed the executrix to turn over and deliver to him the certificates in question. An appeal was taken by respondent to the Circuit court, where there was a trial de novo before the court and a jury and a verdict was returned against petitioner and in favor of the executrix. The trial court denied petitioner's motion for a new trial and entered an order dismissing petitioner's petition as amended. Petitioner appeals.

The verified petition filed in the Probate court is as follows:

"Your petitioner, B. K. Goodman, * * * respectfully

represents unto this Honorable Court as follows:

"1. As of August 11, 1933, he executed an assignment to The Foreman-State National Bank of all of his right, title and interest as beneficiary or otherwise, under or arising out of that certain trust agreement, dated January 24, 1933, executed by and between Continental-Illinois National Bank and Trust Company of Chicago, as Trustee, and Merchants and Manufacturers Securities Company, a corporation, Hugh McLennan (the decedent), Albert J. Weisberg, B. K. Goodman (your petitioner) and Continental-Illinois National Bank and Trust Company of Chicago in its individual capacity, as beneficiaries. Thereafter, The Foreman-State National Bank of Chicago conveyed all of its said right, title and interest to The First National Bank of Chicago, which held the same until March 25, 1939. As of March 25, 1939, The First National Bank of Chicago conveyed all of its said right, title and interest to Hugh McLennan.

"2. Pursuant to the said trust agreement of January 24, 1933, the said beneficiaries had caused to be deposited with and held by the Continental-Illinois National Bank and Trust Company of Chicago, as Trustee, subject to the terms of the said agreement, all Class B Preference Certificates of Beneficial Interest in the Chicago Produce District Trust issued pursuant to the provisions of that certain trust agreement, dated July 14, 1932, identified as Trust No. 29471, made by and between Hugh McLennan, B. K. Goodman and Albert J. Weisberg, as Grantors, Chicago Title and Trust Company, as corporate Trustee, S. J. T. Straus, Sidney H. Kahn and Henry R. Platt, Jr., as Produce Trustees, and S. W. Straus & Co., as Depositary, together with certificates representing 22-1/2% of all common shares of beneficial interest in said Chicago Produce District Trust issued pursuant to the provisions of said trust agreement.

represents unto this Honorable Court as follows:

"1. As of August 11, 1933, he executed an assignment to The Foreman-State National Bank of all of his right, title and interest as beneficiary or otherwise, under or arising out of that certain trust agreement, dated January 24, 1933, executed by and between Continental-Illinois National Bank and Trust Company of Chicago, as Trustee, and Foreman and Manufacturers Securities Company, a corporation, Hugh Melaman (the decedent), Albert J. Weisberg, B. E. Goodman (your petitioner) and Continental-Illinois National Bank and Trust Company of Chicago in its individual capacity, as beneficiaries. Thereafter, The Foreman-State National Bank of Chicago conveyed all of its said right, title and interest to The First National Bank of Chicago, which held the same until March 29, 1939. As of March 29, 1939, The First National Bank of Chicago conveyed all of its said right, title and interest to Hugh Melaman.

"2. Pursuant to the said trust agreement of January 24, 1933, the said beneficiaries had caused to be deposited with and held by the Continental-Illinois National Bank and Trust Company of Chicago, as Trustee, subject to the terms of the said agreement, all Class B Preference Certificates of Beneficial Interest in the Chicago Produce District Trust issued pursuant to the provisions of that certain trust agreement, dated July 14, 1932, identified as Trust No. 29471, made by and between Hugh Melaman, B. E. Goodman and Albert J. Weisberg, as grantors, Chicago Title and Trust Company, as corporate Trustee, S. J. T. Strauss, Sidney H. Kahn and Henry R. Platt, Jr., as Produce Trustees, and S. T. Strauss & Co., as Depositary, together with certificates representing 22-1/2% of all common shares of beneficial interest in said Chicago Produce District Trust issued pursuant to the provisions of said trust agreement.

"3. In March, 1938, McLennan agreed, for good and valuable consideration, to purchase the said interest in said trust agreement of August 11, 1933 from The First National Bank of Chicago as agent for your petitioner and thereupon to turn it and the certificates and stock involved over to your petitioner, who would then repay to him the purchase price. The said agreement was verbal and was entered into in Chicago, and was never rescinded or modified in any way. The consideration for the said agreement was the performance of services by your petitioner in behalf of McLennan, which services were actually performed by your petitioner in accordance with the agreement and to the expressed satisfaction of McLennan.

"4. As of March 25, 1939, The First National Bank of Chicago assigned to McLennan all of the right, title and interest which it acquired under the assignment bearing date of August 11, 1933, executed by B. K. Goodman, under or arising out of that said trust agreement dated January 24, 1933. McLennan purchased the said right, title and interest as agent for your petitioner, pursuant to the verbal agreement he had with your petitioner. The said interest is, therefore, not part of the estate of McLennan, but belongs instead to your petitioner.

"5. Your petitioner claims ownership of the said interest under or arising out of the trust agreement of January 24, 1933, and of the Class B Preference Certificates and common shares of the Chicago Produce District Trust, which are the subject thereof. He herewith tenders to the executrix of the estate of Hugh McLennan the amount paid by McLennan in his behalf for the interest in the said trust agreement, certificates in common shares and tenders further interest at the lawful rate and costs, if any, all as may be determined by this court.

"3. In March, 1932, Holeman agreed, for good and valuable consideration, to purchase the said interest in said trust agreement of August 11, 1933 from the First National Bank of Chicago as agent for your petitioner and thereupon to turn it and the certificates and stock involved over to your petitioner, who would then repay to him the purchase price. The said agreement was verbal and was entered into in Chicago, and was never reasonned or modified in any way. The consideration for the said agreement was the performance of services by your petitioner in behalf of Holeman, which services were actually performed by your petitioner in accordance with the agreement and to the expressed satisfaction of Holeman.

"4. As of March 25, 1932, The First National Bank of Chicago assigned to Holeman all of the right, title and interest which it acquired under the assignment bearing date of August 11, 1933, executed by B. L. Goodman, under or arising out of that said trust agreement dated January 24, 1933. Holeman purchased the said right, title and interest as agent for your petitioner, pursuant to the verbal agreement he had with your petitioner. The said interest is, therefore, not part of the estate of Holeman, but belongs instead to your petitioner.

"5. Your petitioner claims ownership of the said interest under or arising out of the trust agreement of January 24, 1933, and of the Class B Preference Certificates and common shares of the Chicago Produce District Trust, which are the subject thereof. He herewith tenders to the executrix of the estate of Hugh Holeman the amount paid by Holeman in his behalf for the interest in the said trust agreement, certificates in common shares and tendere further interest at the lawful rate and costs, if any, all as may be determined by this court.

"Wherefore, your petitioner prays for the entry of an order or orders authorizing and directing the executrix to turn possession of the said interest, certificates and shares over to him, and authorizing and directing her, further, to execute and deliver to him any assignment or assignments or other instruments that may be necessary in connection with the transfer thereof to him, and for such other and further relief in the premises as shall be equitable and just."

Later the following verified amendment to the petition was filed:

"(1) This Amendment to his Petition is filed pursuant to the order entered by this Honorable Court on November 8, 1940. Your petitioner incorporates herein by reference, with the same force and effect as if herein set forth in full, all of the allegations of his original petition and adds thereto this more specific statement of the time and nature of the consideration for the agreement made between your petitioner and the late Hugh McLennan.

"(2) For some time prior to May, 1938, Hugh McLennan was defending a suit brought against him and others by Benjamin Weintroub and others and he feared early in 1938 that he would thereby be subjected to a substantial judgment. He, therefore, asked your petitioner's assistance at that time in bringing about a settlement of the suit. He agreed in consideration thereof to purchase the said interest in said Trust Agreement of August 11, 1933, from The First National Bank of Chicago, as agent for your petitioner, and thereupon to turn everything over to your petitioner, who would then repay to him the purchase price.

"(3) Your petitioner conferred with various parties in interest on several occasions prior to the end of the month of May, 1938, and succeeded in bringing about an adjustment of the principal matters in controversy in said suit and reduced the liability of McLennan to a comparatively small amount.

"Therefore, your petitioner prays for the entry of an order or orders authorizing and directing the executrix to turn possession of the said interest, certificates and shares over to him, and authorizing and directing her, further, to execute and deliver to him any assignment or assignments or other instruments that may be necessary in connection with the transfer thereof to him, and for such other and further relief in the premises as shall be equitable and just."

Later the following verified amendment to the petition was filed:

"(1) This Amendment to his Petition is filed pursuant to the order entered by this Honorable Court on November 8, 1940. Your petitioner incorporates herein by reference, with the same force and effect as if herein set forth in full, all of the allegations of his original petition and adds thereto this more specific statement of the time and nature of the consideration for the agreement made between your petitioner and the late Hugh Coleman.

"(2) For some time prior to May, 1932, Hugh Coleman was defending a suit brought against him and others by Benjamin Reinstein and others and he feared early in 1932 that he would thereby be subjected to a substantial judgment. He, therefore, asked your petitioner's assistance at that time in bringing about a settlement of the suit. He agreed in consideration thereof to purchase the said interest in said Trust Agreement of August 11, 1933, from The First National Bank of Chicago, as agent for your petitioner, and thereupon to turn everything over to your petitioner, who would then repay to him the purchase price.

"(3) Your petitioner conferred with various parties in interest on several occasions prior to the end of the month of May, 1932, and succeeded in bringing about an adjustment of the principal matters in controversy in said suit and reduced the liability of Coleman to a comparatively small amount.

McLennan was informed at all times of the services and approved of them. He acknowledged that they were of great benefit to him and in accordance with the said verbal agreement. He admitted that he was, therefore, under the contractual obligation to purchase the said interest for your petitioner.

"(4) In further consideration of the said agreement and in reliance thereon, your petitioner made no effort to purchase the said interest directly from The First National Bank of Chicago. Had there been no such agreement, your petitioner would have dealt directly with the bank and purchased the interest from it. From time to time McLennan assured him that he was negotiating with the bank for the purchase of the said interest for your petitioner. By these representations, your petitioner was induced to take no action in his own behalf."

The verified answer of respondent is as follows:

"1. That she neither admits nor denies the allegations contained in Paragraphs 1 and 2 of said Petition, but states that she has no knowledge of the matters therein set forth sufficient to form a belief as to the truth or falsity thereof and therefore demands strict proof thereof;

"2. That she denies each and all of the allegations contained in Paragraph 3 of said Petition, and especially she denies that Hugh McLennan, the decedent herein, in March, 1938, or at any other time, agreed with B. K. Goodman to purchase any certificates of shares, stock, or other property from the First National Bank of Chicago, as agent for the petitioner, B. K. Goodman, and further denies that any services were performed by the said B. K. Goodman, petitioner, for or on behalf of said decedent as consideration for any Agreement, expressed or implied, between the deceased and B. K. Goodman for the purchase of any certificates of shares, stock, or any other property by said deceased from the

Holeman was informed at all times of the services and approved of them. He acknowledged that they were of great benefit to him and in accordance with the said verbal agreement. He admitted that he was, therefore, under the contractual obligation to purchase the said interest for your petitioner.

"(4) In further consideration of the said agreement and in reliance thereon, your petitioner made no effort to purchase the said interest directly from The First National Bank of Chicago. Had there been no such agreement, your petitioner would have dealt directly with the bank and purchased the interest from it. From time to time Holeman assured him that he was negotiating with the bank for the purchase of the said interest for your petitioner. By these representations, your petitioner was induced to take no action in his own behalf."

The verified answer of respondent is as follows:

"1. That she neither admits nor denies the allegations contained in Paragraphs 1 and 2 of said petition, but states that she has no knowledge of the matters therein set forth sufficient to form a belief as to the truth or falsity thereof and therefore demands strict proof thereof;

"2. That she denies each and all of the allegations contained in Paragraph 3 of said petition, and especially she denies that Hugh Holeman, the decedent herein, in March, 1938, or at any other time, agreed with H. K. Goodman to purchase any certificates of shares, stock, or other property from the First National Bank of Chicago, as agent for the petitioner, H. K. Goodman, and further denies that any services were performed by the said H. K. Goodman, petitioner, for or on behalf of said decedent as consideration for any Agreement, expressed or implied, between the deceased and H. K. Goodman for the purchase of any certificates of shares, stock, or any other property by said deceased from the

First National Bank of Chicago for or on behalf of said petitioner.

"3. That she admits that the deceased purchased from the First National Bank of Chicago, all the right, title and interest which said Bank acquired under a certain assignment bearing date of August 11, 1933, executed by B. K. Goodman, assigning to the Foreman-State National Bank of Chicago, all right, title and interest as beneficiary, or otherwise, of the said B. K. Goodman, under a certain trust agreement dated January 24, 1933, executed by and between Continental Illinois National Bank and Trust Company of Chicago, as Trustee and Merchants and Manufacturers Securities Company, a corporation, Hugh McLennan, Albert J. Weisberg and B. K. Goodman and Continental Illinois National Bank and Trust Company, and states that the right, title and interest under said agreement acquired by said assignment from the First National Bank of Chicago by the said Hugh McLennan, Deceased, was acquired by the said Hugh McLennan, as and for his own use and property; that the said right, title and interest acquired by the said Hugh McLennan from the First National Bank of Chicago is a part of this estate and belongs to this estate and is not the property of B. K. Goodman, the petitioner.

"4. That she denies the allegations contained in Paragraph 5 of said Petition.

"5. That she denies each and all of the allegations contained in Paragraphs 2 to 4, inclusive, of the Amendment to the Petition of B. K. Goodman filed herein on November 12, 1940.

"Further answering the Petition of the said B. K. Goodman, heretofore filed herein, this Executrix asks that said Petition be dismissed by this court and that the relief prayed for therein, be denied to said petitioner."

Petitioner contends that the verdict is against the manifest weight of the evidence. Respondent contends that the claim of petitioner is based upon "fabricated testimony" and

First National Bank of Chicago for or on behalf of said petitioner.

"3. That she admits that the deceased purchased from the First National Bank of Chicago, all the right, title and interest which said Bank acquired under a certain assignment bearing date of August 11, 1933, executed by R. K. Goodman, assigning to the Foreman-State National Bank of Chicago, all right, title and interest as beneficiary, or otherwise, of the said R. K. Goodman, under a certain trust agreement dated January 24, 1933, executed by and between Continental Illinois National Bank and Trust Company of Chicago, as trustee and Merchants and Manufacturers Securities Company, a corporation, Hugh Melamman, Albert L. Weisberg and R. K. Goodman and Continental Illinois National Bank and Trust Company, and states that the right, title and interest under said agreement acquired by said assignment from the First National Bank of Chicago by the said Hugh Melamman, Deceased, was acquired by the said Hugh Melamman, as and for his own use and property; that the said right, title and interest acquired by the said Hugh Melamman from the First National Bank of Chicago is a part of this estate and belongs to this estate and is not the property of R. K. Goodman, the petitioner.

"4. That she denies the allegations contained in Paragraph 5 of said Petition.

"5. That she denies each and all of the allegations contained in Paragraphs 2 to 4, inclusive, of the Amendment to the Petition of R. K. Goodman filed herein on November 12, 1940.

"Further answering the Petition of the said R. K. Goodman, heretofore filed herein, this Executrix asks that said Petition be dismissed by this court and that the relief prayed for therein, be denied to said petitioner."

Petitioner contends that the verdict is against the manifest weight of the evidence. Respondent contends that the claim of petitioner is based upon "fabricated testimony" and

is not an honest claim; that petitioner attempted to prove the alleged agreement by oral statements claimed to have been made by McLennan, now deceased, and that when the evidence bearing upon the alleged statements is carefully scrutinized and considered with all of the other evidence in the case in the light of the law that applies to such evidence, it clearly appears why the jury and the trial court refused to believe the evidence of petitioner as to the alleged agreement. As we have reached the conclusion, after a careful examination of all the evidence, that the contention of respondent is a meritorious one, we deem it proper to state at some length the evidence that bears upon the alleged agreement.

Petitioner sought to prove the alleged agreement by the testimony of Grace Burke, Edward L. Schoen and Sam Lederer. Grace Burke was the secretary of petitioner and had been so employed by him for nine years. She testified that she first saw McLennan in Goodman's office "in the early spring" of 1938; that McLennan came into the office and spoke to Goodman; that McLennan "said he was afraid there was going to be a substantial judgment entered against him in the Weintraub case and he wanted Goodman to use his influence in getting that case settled;" that Goodman said he thought McLennan had a lot of nerve coming to him and asking him to do a thing like that, because a few years prior he had asked McLennan to do him a favor and McLennan refused; that McLennan said he was sorry he had not done what Goodman asked, but he was willing to do it now, that he would buy Goodman's interest in the South Water Market from the First National Bank for him if Goodman would help to get the case settled; that McLennan asked Goodman what he would pay for it, and Goodman said he would pay $3,000, that if necessary he would go as high as $5,000, but that he wanted to get it as cheaply as he could. "That is all I can remember of the conversation." Upon

is not an honest claim; that petitioner attempted to prove the alleged agreement by oral statements claimed to have been made by Eckerman, now deceased, and that when the evidence bearing upon the alleged statements is carefully scrutinized and considered with all of the other evidence in the case in the light of the law that applies to such evidence, it clearly appears why the jury and the trial court refused to believe the evidence of petitioner as to the alleged agreement. As we have reached the conclusion, after a careful examination of all the evidence, that the contention of respondent is a meritorious one, we deem it proper to state at some length the evidence that bears upon the alleged agreement.

Petitioner sought to prove the alleged agreement by the testimony of Grace Burke, Edward L. Gadsen and Sam Lederer. Grace Burke was the secretary of petitioner and had been so employed by him for nine years. She testified that she first saw Eckerman in Goodman's office "in the early spring" of 1928; that Eckerman came into the office and spoke to Goodman; that Eckerman "said he was afraid there was going to be a great material judgment entered against him in the Kentucky case and he wanted Goodman to use his influence in getting that case settled;" that Goodman said he thought Eckerman had a lot of nerve coming to him and asking him to do a thing like that, because a few years prior he had asked Eckerman to do him a favor and Eckerman refused; that Eckerman said he was sorry he had not done what Goodman asked, but he was willing to do it now, that he could buy Goodman's interest in the South Water market from the First National Bank for him if Goodman would help to get the case settled; that Eckerman asked Goodman what he would pay for it, and Goodman said he would pay $3,000, that if necessary he would go as high as $5,000, but that he wanted to get it as cheaply as he could. "That is all I can remember of the conversation." Upon

cross-examination she testified that Goodman's office is right off the reception room, and that at the time she was at her desk in the reception room, right outside the doorway of Goodman's office; that no one else was present in the office; that she did not speak to McLennan upon his arrival, that he walked right past her; that McLennan did not have an appointment with Goodman; that she could see McLennan in Goodman's office by looking through the door; that he was standing; that he was in Goodman's office about half an hour, maybe longer; that she does not know the month the talk took place but "it was in the early spring" of 1938; that she does not remember what she was doing while McLennan was in Goodman's office; that she does not recall any other conference that Goodman had in his office at that time of the year; that Goodman first spoke to her about the talk in August or September, 1940; that she has discussed with Goodman that talk eight or ten times, maybe a dozen times. Miss Burke's testimony is the strongest evidence in support of the alleged agreement. If we were to assume the truth of her testimony as to what occurred at the time and place in question, nevertheless, it fails to show any acceptance by Goodman of the alleged offer made by McLennan or any promise by Goodman that he would try to settle the Weintraub case. Edward L. Schoen testified that he was a printing and advertising salesman; that he knew Goodman and knew McLennan "casually;" that he did not have anything to do with the South Water Street Market; that he met McLennan and Goodman on the east side of Michigan avenue, around Randolph street, about the end of the summer or the beginning of the fall of 1938; that he met them "possibly north of Randolph street * * *;" that Sam Lederer was with the witness; that he heard a conversation between McLennan and Goodman at that time; "Q. Well, state what it was. A. Well, Sam and I were walking along and Goodman and McLennan were walking in the opposite direction,

cross-examination she testified that Goodman's office is right off the reception room, and that at the time she was at her desk in the reception room, right outside the doorway of Goodman's office; that no one else was present in the office; that she did not speak to Molenman upon his arrival, that he walked right past her; that Molenman did not have an appointment with Goodman; that she could see Molenman in Goodman's office by looking through the door; that he was standing; that he was in Goodman's office about half an hour, maybe longer; that she does not know the month the talk took place but "it was in the early spring" of 1939; that she does not remember what she was doing while Molenman was in Goodman's office; that she does not recall any other conference that Goodman had in his office at that time of the year; that Goodman first spoke to her about the talk in August or September, 1940; that she has discussed with Goodman that talk eight or ten times, maybe a dozen times. Miss Burke's testimony is the strongest evidence in support of the alleged agreement. If we were to assume the truth of her testimony as to what occurred at the time and place in question, nevertheless, it fails to show any acceptance by Goodman of the alleged offer made by Molenman or any promise by Goodman that he would try to settle the Leintraub case. Edward L. Colman testified that he was a printing and advertising salesman; that he knew Goodman and knew Molenman "casually;" that he did not have anything to do with the South Water Street Market; that he met Molenman and Goodman on the east side of Michigan avenue, around Randolph street, about the end of the summer or the beginning of the fall of 1939; that he met them "possibly north of Randolph street * * *;" that Sam Ledorer was with the witness; that he heard a conversation between Molenman and Goodman at that time; "I, well, state to that it was. I, well, Sam and I were walking along and Goodman and Molenman were walking in the opposite direction,

south I would say, and Sam greeted Mr. McLennan and Mr. Goodman, * * * There was not any particular conversation between Mr. McLennan and Mr. Goodman. * * * Mr. McInerney [attorney for petitioner]: Q. What did Mr. McLennan say? The Witness: A. Mr. McLennan said, 'Ben and I are working together again. As a matter of fact, I am buying his stock, his interest', or something like that - 'in the South Water Market back for him from the First National Bank and we are going to be partners again.' Q. Did Goodman say anything? A. I don't remember what Goodman said." Upon cross-examination Schoen testified that he could not give the day or month that the conversation took place; that he could not remember what he and Lederer had been talking about before they met McLennan and Goodman; that he talked to Goodman about the conversation about the end of 1939 or the beginning of 1940 in Goodman's office; that he had no business with Mr. Goodman at the time. Sam Lederer testified (by deposition) that he lived at the Majestic Hotel, 29 W. Quincy street, Chicago; that he is a publicity man; that fifteen years before that time he had handled the publicity of the Chicago Produce District Trust or the South Water Street Market; that McLennan and Goodman were connected with it; that he knew them and was employed by them; that he worked for the Market and they were its executives; that there was a three months' campaign to publicize the Market at that time; that he last saw McLennan about a year prior to his death; that it was either late in the summer or early in the fall that he saw him on the east side of Michigan avenue, about a block south of 307 North Michigan; that Goodman was with McLennan; that he (Lederer) was with Schoen at the time; that the meeting was "by accident;" that McLennan said: "'Well,' he says, 'we are going to be good friends again now. In fact,' he says, 'I am going to buy some of Ben's stock from the Bank for him;'" that he could not recall anything more of the conversation and if Goodman said

south I would say, and Dan greeted Mr. Molenman and Mr. Goodman.
* * * There was not any particular conversation between Mr.
Molenman and Mr. Goodman. * * * Mr. Molenmey [attorney for
petitioner]: Q. What did Mr. Molenman say? The witness: A.
Mr. Molenman said, 'Dan and I are working together again. As a
matter of fact, I am buying his stock, his interest', or some-
thing like that - 'in the South Water Market back for him from
the First National Bank and we are going to be partners again.'
Q. Did Goodman say anything? A. I don't remember what Good-
man said." Upon cross-examination Schoen testified that he
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that he could not remember what he and Lederer had been talking
about before they met Molenman and Goodman; that he talked to
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before that time he had handled the publicity of the Chicago
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Molenman and Goodman were connected with it; that he knew them
and was employed by them; that he worked for the Market and they
were its executives; that there was a three months' campaign to
publicize the Market at that time; that he last saw Molenman
about a year prior to his death; that it was either late in
the summer or early in the fall that he saw him on the east
side of Michigan avenue, about a block south of 307 North
Michigan; that Goodman was with Molenman; that he (Lederer)
was with Schoen at the time; that the meeting was "by accident;"
that Molenman said: "'Well,' he says, 'we are going to be good
friends again now. In fact,' he says, 'I am going to buy some
of Dan's stock from the Bank for him;'" that he could not
recall anything more of the conversation and if Goodman said

anything he could not recall it. Upon cross-examination the witness stated that it was early in the afternoon that he met McLennan and Goodman; that he could not recall where he had been prior to the time he met Schoen; that he could not recall anything that he and Schoen had talked about prior to the meeting with Goodman and McLennan; that after that day he met Goodman frequently in a social way; that in the fall of 1939 he learned of McLennan's death through the newspapers and within a few days thereafter he went to Goodman's office and said: "'Well, I see Hugh McLennan is dead.' I said, 'He should have outlived me by twenty-five years. He was a strong, powerful man.' And we discussed his habits and so forth;" that at that conversation he told "Mr. Goodman about the conversation on Michigan avenue," but that Goodman did not say anything about it; that he said to Goodman: "The last time I saw him was about a year ago when you were together on Michigan avenue," but that Mr. Goodman said nothing in answer to that statement; that between the time of the conversation on Michigan avenue and the time of McLennan's death he saw Goodman frequently, - sometimes at Goodman's home.

There is nothing in the testimony of Miss Burke, Schoen or Lederer that tends to prove that Goodman accepted the alleged offer of McLennan and agreed to perform the service. Their evidence as to the alleged agreement is uncertain and indefinite as to its terms. The amended petition alleges that petitioner, at the request of McLennan and as an acceptance of his promise to purchase, "succeeded in bringing about an adjustment of the principal matters in controversy in said suit and reduced the liability of McLennan to a comparatively small amount." To prove this allegation petitioner relies upon the testimony of Attorney Samuel P. Gurman. The following is the gist of Gurman's testimony: "I had a conversation with Goodman referable to the settlement of the accounting suit, in

anything he could not recall it. Upon cross-examination the witness stated that it was early in the afternoon that he met Holemman and Goodman; that he could not recall where he had been prior to the time he met Holemen; that he could not recall anything that he and Holemen had talked about prior to the meeting with Goodman and Holemman; that after that day he met Goodman frequently in a social way; that in the fall of 1939 he learned of Holemman's death through the newspapers and within a few days thereafter he went to Goodman's office and said: "Well, I see Hugh Holemman is dead." I said, "He should have outlived me by twenty-five years. He was a strong, powerful man." And we discussed his habits and so forth;" that at that conversation he told "Mr. Goodman about the conversation on Michigan avenue," but that Goodman did not say anything about it; that he said to Goodman: "The last time I saw him was about a year ago when you were together on Michigan avenue," but that Mr. Goodman said nothing in answer to that statement; that between the time of the conversation on Michigan avenue and the time of Holemman's death he saw Goodman frequently, - sometimes at Goodman's home.

There is nothing in the testimony of Miss Burk, Holemen or Lederer that tends to prove that Goodman accepted the alleged offer of Holemman and agreed to perform the service. Their evidence as to the alleged agreement is uncertain and indefinite as to its terms. The amended petition alleges that petitioner, at the request of Holemman and as an acceptance of his promise to purchase, "succeeded in bringing about an adjustment of the principal matters in controversy in said suit and reduced the liability of Holemman to a comparatively small amount." To prove this allegation petitioner relies upon the testimony of Attorney Samuel F. German. The following is the gist of German's testimony: "I had a conversation with Goodman referable to the settlement of the accounting suit, in

so far as McLennan and the other defendants were involved. * * * That accounting suit was dismissed by settlement in May, 1938. The liability of McLennan was extinguished by that settlement and dismissed. I had a conversation with McLennan referable to the settlement around January or February, 1938, in your (Mr. McInerney's) office. * * * McLennan called me aside. The matter of settling the suit was considered and he said to me at the time: 'You know my differences with B. K. Goodman have been straightened out and I am sure Goodman is going to talk to you about that, and I wish you would go easy and settle this case up for me'. I told him Goodman had talked to me about settling the case up, he had a number of conversations with me." Gurman's evidence does not show that Goodman "succeeded in bringing about an adjustment of the principal matters in controversy in said suit and reduced the liability of McLennan to a comparatively small amount." It does show that Goodman's conversation with Gurman related to McLennan "and the other defendants." What defendants, if any, paid anything in settlement of the suit does not appear. Grace Burke testified that the McLennan conversation in petitioner's office took place in the early spring of 1938. Her testimony is susceptible of but one interpretation, viz., that McLennan then made, for the first time, his offer to Goodman. But Gurman states that in his talk with McLennan around January or February, 1938, in the office of Goodman's lawyer, McLennan told him that his differences with Goodman had been straightened out and that he was sure Goodman was going to talk to Gurman about it. There is no evidence to support the following allegations in the petition: "Petitioner conferred with various parties in interest on several occasions * * *." "McLennan was informed at all times of the services and approved of them." "He acknowledged that they were of great benefit to him and in accordance with the said verbal agree-

so far as Molenman and the other defendants were involved.

* * * That accounting suit was dismissed by settlement in May, 1938. The liability of Molenman was extinguished by that settlement and dismissal. I had a conversation with Molenman referable to the settlement around January or February, 1939, in your (Mr. McInerney's) office. * * * Molenman called me aside. The matter of settling the suit was considered and he said to me at the time: 'You know my differences with B. K. Goodman have been straightened out and I am sure Goodman is going to talk to you about that, and I wish you would go easy and settle this case up for me'. I told him Goodman had talked to me about settling the case up, he had a number of conversations with me." Gurman's evidence does not show that Goodman "succeeded in bringing about an adjustment of the principal matters in controversy in said suit and reduced the liability of Molenman to a comparatively small amount." It does show that Goodman's conversation with Gurman related to Molenman "and the other defendants." "Not defendants, if any, paid anything in settlement of the suit does not appear. Grace Burke testified that the Molenman conversation in petitioner's office took place in the early spring of 1938. Her testimony is susceptible of but one interpretation, *viz.*, that Molenman then made, for the first time, his offer to Goodman. But Gurman states that in his talk with Molenman around January or February, 1939, in the office of Goodman's lawyer, Molenman told him that his differences with Goodman had been straightened out and that he was sure Goodman was going to talk to Gurman about it. There is no evidence to support the following allegations in the petition: "Petitioner conferred with various parties in interest on several occasions * * *." "Molenman was informed at all times of the services and approved of them." "He acknowledged that they were of great benefit to him and in accordance with the said verbal agree-

ment. He admitted that he was, therefore, under the contractual obligation to purchase the said interest for your petitioner."

Petitioner's case is based upon the testimony of the foregoing witnesses, and the material parts of their testimony relate to alleged statements and admissions by McLennan. Before taking up facts and circumstances in evidence that respondent contends show clearly that the evidence of Miss Burke, Schoen and Lederer is "fabricated," we will refer to the law that bears upon the testimony of said witnesses for petitioner. Many years ago the Supreme court of the United States (Lea v. Polk County Copper Co., 62 U. S. 493, 504) stated that "* * * courts of justice lend a very unwilling ear to statements of what dead men had said." In Keshner v. Keshner, 376 Ill. 354, 363, our Supreme court made a like statement and added "that such evidence is subject to great abuse and that it will be carefully scrutinized as well as considered with all the other evidence in the case. (Megginson v. Megginson, 367 Ill. 168, 180; Fierke v. Elgin City Banking Co., 366 id. 66.)" In Megginson v. Megginson, 367 Ill. 168, 180, the court states: "We have recently had occasion to observe that the evidence of admissions made by persons since dead should be carefully scrutinized and considered with all the evidence in the case, as it is likely to be abused. Fierke v. Elgin City Banking Co., 366 Ill. 66; Moreen v. Estate of Carlson, 365 id. 482." Many decisions of the sister States, to the same effect, might be cited if it were necessary, but the rule of law announced in the foregoing cases is well settled. If that rule did not prevail no estate would be safe from dishonest claims.

Evidence for respondent shows that the securities in question, together with other securities, came into the possession of the First National Bank by assignment from the Foreman-State National Bank on or about September 8, 1936, and that the First National Bank held the securities in question as its own

ment. He admitted that he was, therefore, under the contractual obligation to purchase the said interest for your petitioner."

Petitioner's case is based upon the testimony of the foregoing witnesses, and the material parts of their testimony relate to alleged statements and admissions by Reimmen. Before taking up facts and circumstances in evidence that respondent contends show clearly that the evidence of Miss Burke, Cohen and Lederer is "fabricated," we will refer to the law that bears upon the testimony of said witnesses for petitioner. Many years ago the supreme court of the United States (Lea v. Polk County Copper Co., 62 U. S. 493, 504) stated that "* * * courts of justice land a very unwilling ear to statements of what dead men had said." In Kaufmer v. Keimer, 376 Ill. 324, 325, our supreme court made a like statement and added "that such evidence is subject to great abuse and that it will be carefully scrutinized as well as considered with all the other evidence in the case. (Pearlman v. Pearlman, 367 Ill. 168, 180; Fiske v. Illinois City Banking Co., 266 id. 66.)" In Pearlman v. Pearlman, 367 Ill. 163, 180, the court states: "We have recently had occasion to observe that the evidence of admissions made by persons since dead should be carefully scrutinized and considered with all the evidence in the case, as it is likely to be abused. Fiske v. Illinois City Banking Co., 266 Ill. 66; Moreen v. Estate of Boylson, 367 id. 482." Many decisions of the sister States, to the same effect, might be cited if it were necessary, but the rule of law announced in the foregoing cases is well settled. If that rule did not prevail no estate would be safe from dishonest claims.

Evidence for respondent shows that the securities in question, together with other securities, came into the possession of the First National Bank by assignment from the Foreman-State National Bank on or about September 8, 1936, and that the First National Bank held the securities in question as its own

property until it assigned them to McLennan on or about April 21, 1939. The securities in question were a part of collateral securities given by Goodman to secure the payment of his note. Goodman apparently defaulted on his note and the bank took the securities and cancelled Goodman's obligation. During all the time that the bank retained possession of the securities in question it was endeavoring to dispose of them, and Johnson, one of its vice presidents, testified that the bank "would sell the interest to whoever would pay us the most for it." While the said securities were held by the Foreman-State National Bank an effort was made to sell them to McLennan in 1933. An effort was made by the First National Bank to sell them to the Continental Bank but without success. Then it tried to sell them to McLennan for $5,000, but McLennan asked the bank "to hold off until he returned from his honeymoon." In August, 1936, McLennan stated to the bank that he was not interested in purchasing the securities because of pending litigation involving the subject matter of the sale. The record does not clearly show the nature of that litigation nor why it prevented McLennan from purchasing the securities. The bank again had negotiations with McLennan in July, 1937 (the accounting suit was then still pending), and he then indicated that he would be interested in acquiring the securities for $4,500, but he stated that it would take at least ninety days before he could take the matter up as he was leaving for Europe. It must be kept in mind that the alleged offer to Goodman did not take place until the early spring of 1938. Albert J. Weisberg, who was acting for the First National Bank in liquidating certain collateral, including the securities in question, testified: "Johnson [assistant vice president of the bank] and I offered to sell it to the Continental Bank, who had held some of this same stock, and they were not interested at that time. Then we offered it to McLennan, who was interested at that time, but did not have the funds, and we

property until it assigned them to Molenman on or about April 21, 1939. The securities in question were a part of collateral securities given by Goodman to secure the payment of his note. Goodman apparently defaulted on his note and the bank took the securities and cancelled Goodman's obligation. During all the time that the bank retained possession of the securities in question it was endeavoring to dispose of them, and Johnson, one of its vice presidents, testified that the bank "would sell the interest to whoever would pay us the most for it." While the said securities were held by the Foreman-State National Bank an effort was made to sell them to Molenman in 1933. An effort was made by the First National Bank to sell them to the Continental Bank but without success. Then it tried to sell them to Molenman for $5,000, but Molenman asked the bank "to hold off until he returned from his honeymoon." In August, 1936, Molenman stated to the bank that he was not interested in purchasing the securities because of pending litigation involving the subject matter of the sale. The record does not clearly show the nature of that litigation nor why it prevented Molenman from purchasing the securities. The bank again had negotiations with Molenman in July, 1937 (the accounting suit was then still pending), and he then indicated that he would be interested in acquiring the securities for $4,500, but he stated that it would take at least ninety days before he could take the matter up as he was leaving for Europe. It must be kept in mind that the alleged offer to Goodman did not take place until the early spring of 1938. Albert J. Stabers, who was acting for the First National Bank in liquidating certain collateral, including the securities in question, testified: "Johnson [assistant vice president of the bank] and I offered to sell it to the Continental Bank, who had held some of this same stock, and they were not interested at that time. Then we offered it to Molenman, who was interested at that time, but did not have the funds, and we

- both Johnson and I - negotiated with him from time to time until he actually acquired the interest. We had our first negotiations with McLennan in 1933 [they were then connected with Foreman-State National Bank], sometime after we had acquired the collateral from Goodman. In substance, we told him that we had acquired this Goodman interest and that we were liquidating all of the various assets we had, and would he be interested, and we offered it at a price of, I believe, $5,000. He did not accept it at that price in the first instance. Some time later he made various inquiries of Johnson and others at the bank, but did not have the funds at that time. I had talked to McLennan at various times, because I saw him in connection with the South Water Market. He would always ask whether that [the securities in question] was still available. I stated it was still there. He wanted to know whether the price had changed any, because there were some redemptions. I told him he would have to talk to Johnson about the price. I knew what the price was in the first instance and there were various negotiations with him until he finally made the deal with Johnson sometime in 1938." The evidence is conclusive that while McLennan was negotiating for the securities in question over a period of years, commencing in 1933, during all of that time any person who was willing to pay the price requested by the banks might have purchased the securities. Johnson further testified that in March of 1938 the First National Bank again had negotiations with McLennan in reference to the securities and that the latter then stated "that he would not pay more than $4,000 for it, and if we cared to accept that amount he would arrange to buy it." On June 15, 1938, McLennan purchased the securities in question for $4,000, paying $1,000 in cash and giving a note for the balance, payable in six months. The note was not paid in full when it became due but it was

- both Johnson and I - negotiated with him from time to time until he actually acquired the interest. We had our first negotiations with Kolemman in 1933 [they were then connected with Foreman-State National Bank], something after we had acquired the collateral from Goldman. In substance, we told him that we had acquired this German interest and that we were liquidating all of the various assets we had, and would be interested, and we offered it at a price of, I believe, $2,000. He did not accept it at that price in the first instance. Some time later he made various inquiries of Johnson and others at the bank, but did not have the funds at that time. I had talked to Kolemman at various times, because I saw him in connection with the South Water Market. He would always ask whether that [the securities in question] was still available. I stated it was still there. He wanted to know whether the price had changed any, because there were some redemptions. I told him he would have to talk to Johnson about the price. I knew what the price was in the first instance and there were various negotiations with him until he finally made the deal with Johnson sometime in 1933." The evidence is conclusive that while Kolemman was negotiating for the securities in question over a period of years, commencing in 1933, during all of that time any person who was willing to pay the price requested by the banks might have purchased the securities. Johnson further testified that in March of 1938 the First National Bank again had negotiations with Kolemman in reference to the securities and that the latter then stated "that he would not pay more than $4,000 for it, and if we cared to accept that amount he would arrange to buy it." On June 15, 1938, Kolemman purchased the securities in question for $4,000, paying $1,000 in cash and giving a note for the balance, payable in six months. The note was not paid in full when it became due but it was

partially paid and renewed and was finally paid in full on March 25, 1939. Had McLennan been buying the securities for Goodman it would have been unnecessary for him to give his note for the unpaid balance and afterwards renew it because, according to petitioner's theory, he stood ready to repay McLennan the entire purchase price paid for the securities. There is no doubt that McLennan purchased the securities in question on June 15, 1938, yet, Lederer testified that when they met McLennan and Goodman on Michigan avenue at the end of the summer or the beginning of the fall of 1938 McLennan said: "We are going to be good friends again now. In fact, I am going to buy some of Ben's stock from the bank for him," and Schoen testified that McLennan said, "I am buying his stock * * * for him." On September 30, 1938, McLennan wrote to Weisberg and offered to sell him a one-half interest in the securities in question for one-half of the price he paid for the securities, or, in the alternative, he offered to give Weisberg a one-quarter interest in the securities on account of services previously rendered by Weisberg "in various real estate problems." Weisberg elected to accept a one-quarter interest in the securities and the written assignment of a one-fourth interest to Weisberg, signed by McLennan, dated May 18, 1939, is a part of the record. As respondent argues: "McLennan gave to Weisberg a one-quarter interest in the security without receiving a penny for it and petitioner sought to persuade the court and jury that when he did so he knew that the security did not belong to him but belonged to Goodman."

The amended petition alleges that petitioner made no effort to purchase the said securities directly from the First National Bank because he relied upon McLennan's agreement to purchase the securities for petitioner. It is pertinent, therefore, to examine into petitioner's actions, positive and negative, that bear upon that subject. Goodman was a business man. There is no evidence that at any time during

partially paid and renewed and was finally paid in full on March 25, 1939. Had Molenman been buying the securities for Goodman it would have been unnecessary for him to give his note for the unpaid balance and afterwards renew it because, according to petitioner's theory, he stood ready to repay Molenman the entire purchase price paid for the securities. There is no doubt that Molenman purchased the securities in question on June 15, 1938, yet, Lederer testified that when they met Molenman and Goodman on Michigan avenue at the end of the summer or the beginning of the fall of 1938 Molenman said: "We are going to be good friends again now. In fact, I am going to buy some of Mon's stock from the bank for him," and Tolson testified that Molenman said, "I am buying his stock * * * for him." On September 30, 1938, Molenman wrote to Weisberg and offered to sell him a one-half interest in the securities in question for one-half of the price he paid for the securities, or, in the alternative, he offered to give Weisberg a one-quarter interest in the securities on account of services previously rendered by Weisberg "in various real estate problems." Weisberg elected to accept a one-quarter interest in the securities and the written assignment of a one-fourth interest to Weisberg, signed by Molenman, dated May 18, 1939, is a part of the record. As respondent argues: "Molenman gave to Weisberg a one-quarter interest in the security without receiving a penny for it and petitioner sought to persuade the court and jury that when he did so he knew that the security did not belong to him but belonged to Goodman."

The amended petition alleges that petitioner made no effort to purchase the said securities directly from the First National Bank because he relied upon Molenman's agreement to purchase the securities for petitioner. It is pertinent, therefore, to examine into petitioner's actions, positive and negative, that bear upon that subject. Goodman was a business man. There is no evidence that at any time during

the period of years that the banks held the securities and were ready and willing to sell them, Goodman or anyone on his behalf made any effort to purchase these securities from the banks. In fact, Johnson testified: "I never had any negotiations with B. K. Goodman with respect to the purchase of it." There is no evidence to show that after the alleged agreement Goodman made any effort to obtain the securities from McLennan or that he made any inquiries as to the status of the securities, although eighteen months elapsed between the time of the alleged agreement and McLennan's death. While petitioner could not testify to conversations he had with McLennan, if he had any, still, if there were any letter, note or memorandum that bore upon the subject and that passed between him and McLennan, such evidence would have been competent. The record is silent as to whether he ever conferred with anyone at the bank to ascertain if a sale had been consummated. So far as the record shows, for at least one year after the death of McLennan, which occurred eighteen months after the alleged contract was made, Goodman made no inquiries of the bank in respect to the securities. According to the testimony of Schoen and Lederer, McLennan stated that he and Goodman were working together; which, if true, would certainly have created a situation that would have given Goodman ample opportunity to inquire of McLennan about the securities during the latter's lifetime. Lederer testified that a few days after McLennan's death he went to Goodman's office and called his attention to the death of McLennan, and, strangely indeed, reminded Goodman of the alleged conversation on Michigan avenue. Schoen testified that he talked with Goodman about that conversation, in Goodman's office, "maybe the last part of 1939 or the first part of 1940." Goodman testified that he first learned in August or September, 1940, which was two and one-half years after the alleged agreement was made, <u>and a year after the</u>

the period of years that the banks held the securities and were ready and willing to sell them, Goodman or anyone on his behalf made any effort to purchase these securities from the banks. In fact, Johnson testified: "I never had any negotiations with H. L. Goodman with respect to the purchase of it." There is no evidence to show that after the alleged agreement Goodman made any effort to obtain the securities from Eckerman or that he made any inquiries as to the status of the securities, although eighteen months elapsed between the time of the alleged agreement and Eckerman's death. While petitioner could not truthfully to conversations he had with Eckerman, if he had any, still, if there were any letter, note or memorandum that bore upon the subject and that passed between him and Eckerman, such evidence would have been competent. The record is silent as to whether he ever conferred with anyone at the bank to ascertain if a sale had been consummated. So far as the record shows, for at least one year after the death of Eckerman, which occurred eighteen months after the alleged contract was made, Goodman made no inquiries of the bank in respect to the securities. According to the testimony of Schoen and Lederer, Eckerman stated that he and Goodman were working together; which, if true, would certainly have created a situation that would have given Goodman ample opportunity to inquire of Eckerman about the securities during the latter's lifetime. Lederer testified that a few days after Eckerman's death he went to Goodman's office and called his attention to the death of Eckerman, and, strangely indeed, reminded Goodman of the alleged conversation on Eighth avenue. Schoen testified that he talked with Goodman about that conversation, in Goodman's office, "maybe the last part of 1939 or the first part of 1940." Goodman testified that he first learned in August or September, 1940, which was two and one-half years after the alleged agreement was made, and a year after the

death of McLennan, that McLennan had purchased "the certificates in controversy here," and he further testified as to how he learned that fact. He states that in August or September, 1940, he called Charles Aaron, attorney for the First National Bank, and "I asked Aaron what price the bank would take for my interest in the South Water Market which I had given to the bank previously. He told me he would find out how much the bank wanted for it and would let me know. I did not hear from him for two, three or four days. The conversation was my asking him how much the bank would want and he telling me he would let me know as soon as he took it up with the bank. He called me two, three or four days later and told me he was surprised to hear that the bank had already sold my stocks that I had owned and had sold it to McLennan just before McLennan died." Thus it appears from his own testimony that he called the bank, not to ascertain whether McLennan had purchased the securities, and, if so, when, and at what price, but to find out what price the bank would take for the securities. It would appear from petitioner's testimony that when he spoke to Mr. Aaron he did not have in mind the alleged agreement that he claims he had with McLennan in reference to the securities. The petition alleges that Goodman performed his part of the contract by May, 1938, when the law suit was settled. McLennan lived for fifteen months thereafter, yet there is not a fact or a circumstance in the case to show that Goodman ever inquired of McLennan during the said period of time whether the latter had discharged his obligations under the alleged agreement.

The jury, who saw and heard the witnesses, found by their verdict that they did not believe petitioner's evidence as to the alleged agreement. The able and experienced judge who tried thiscase, when he denied petitioner's motion for a new trial, said: "I think it is a very fair verdict."

Petitioner contends that the "court erred in treating the

death of Coleman, that Coleman had purchased "the certificates in controversy here," and he further testified as to how he learned that fact. He states that in August or September, 1940, he called Charles Aaron, attorney for the First National Bank, and "I asked Aaron what price the bank would take for my interest in the South Water Market which I had given to the bank previously. He told me he would find out how much the bank would for it and let me know. I did not hear from him for two, three or four days. The conversation was by asking him how much the bank would want and he telling me he would let me know as soon as he took it up with the bank. He called me two, three or four days later and told me he was surprised to hear that the bank had already sold my stocks that I had owned and had sold it to Coleman just before Coleman died." Thus it appears from his own testimony that he called the bank, not to ascertain whether Coleman had purchased the securities, and, if so, when, and at what price, but to find out what price the bank would take for the securities. It would appear from petitioner's testimony that when he spoke to Mr. Aaron he did not have in mind the alleged agreement that he claims he had with Coleman in reference to the securities. The petition alleges that Goodman performed his part of the contract by May, 1938, when the law suit was settled. Coleman lived for fifteen months thereafter, yet there is not a fact or a circumstance in the case to show that Goodman ever inquired of Coleman during the said period of time whether the latter had discharged his obligations under the alleged agreement.

The jury, who saw and heard the witnesses, found by their verdict that they did not believe petitioner's evidence as to the alleged agreement. The able and experienced judge who tried the case, when he denied petitioner's motion for a new trial, said: "I think it is a very fair verdict."

Petitioner contends that the "court erred in treating the

petition * * * as a common law claim or demand against said estate of Hugh McLennan; and erred in overruling the petitioner's objections to impaneling a jury and the submission of the issues to such jury in said case; and erred in entering a common law judgment on the verdict so returned by the jury. A. The petition * * * does not constitute a claim against the estate of Hugh McLennan under Article XVII of the Probate Act and the provision under said Article XVII for a jury at the demand of any interested person does not apply to this case. * * * C. The * * * Court erred in conducting these proceedings as an action at law for the enforcement of a common law cause of action and the judgment entered herein by the court was clearly erroneous and the verdict returned by the jury finding the issues for the respondent was likewise erroneous or void."

Respondent filed a demand for a jury trial and petitioner objected to the impaneling of a jury and the submission of the issues to a jury "for the reason that the same is illegal and without authority of law." The trial court overruled the objection and a jury was impaneled. The counsel then addressed the jury "and thereafter a short recess was had, and the jury retired to the jury room, and the following had out ~~xxx~~ of the presence of the jury: Mr. Leeming [attorney for respondent]: Before the jury is called in, I think, if the court please, that we have generally agreed on the fact that the issues may be submitted to the jury simply to find the issues in favor of the petitioner or in favor of the respondent, eliminating from putting before the jury the question of accounting. In the event they should find in favor of the petitioner, then there will be certain figures to get up as to payments on the certificates and so forth, and interest on the note. It seemed to us, if it meets with your Honor's approval, that that could very well be submitted to the court, either by stipulation or by evidence, if necessary, and I doubt very much if evidence will be necessary. The Court:

petition * * * as a common law claim or demand against said estate of High Schoolman; and erred in overruling the petitioner's objections to impaneling a jury and the submission of the issues to such jury in said case; and erred in entering a common law judgment on the verdict so returned by the jury. 4. The petition * * * does not constitute a claim against the estate of High Schoolman under Article XVIII of the probate act and the provision under said Article XVIII for a jury at the demand of any interested person does not apply to this case. * * * 5. The * * * Court erred in conducting these proceedings as an action at law for the enforcement of a common law cause of action and the judgment entered herein by the court was clearly erroneous and the verdict returned by the jury finding the issues for the respondent was likewise erroneous or void."

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You do not dispute the figures? Mr. Leeming: That is right, neither of us will dispute the figures of the Bank in the event it should become material, the issue being submitted in that manner. That is our agreement, that if it should be submitted in that manner, it would be without prejudice to the right of either party to request special findings, if he should see fit to do so, except as to the amount involved. The only issue that would be submitted would be that relating to the finding of the issues, and not as to the accounting. Mr. McInerney [attorney for petitioner]: It is further agreed, as I understand it, and the record may show, that whatever the amount is, we have tendered that amount and continue to make the tender good, and that the verdict will be, if there is a verdict, that the property be surrendered upon payment of whatever he paid for the stock, plus whatever interest charges. Mr. Leeming: Yes, I think there is no objection to that. You understand the statement that I made is proper and is agreeable to both parties? Mr. McInerney: Yes, that is agreeable. The Court: All right, bring out the jury. (Whereupon the jury resumed their seats in the jury box.)" In view of the foregoing agreement of the counsel made in open court it would seem that petitioner waived his objection to a trial by jury.

In Hansen v. Swartz, 345 Ill. 609, the construction of sections 81 and 82 of the Administration Act, as amended in 1925, was involved, and the court said (p. 613):

"Sections 81 and 82 of the Administration act before their amendment in 1925 created a right of reaching property which had been placed by the deceased in his lifetime in the possession of the party charged, and the remedy did not extend to the determination of a contested right or title to the property because no provision was made for the trial by jury, without which no man can be deprived, constitutionally, of his property. (Sullivan

You do not dispute the figures? Mr. Leeming: That is right; neither of us will dispute the figures of the bank in the event it should become material, the issue being submitted in that manner. That is our agreement, that if it should be submitted in that manner, it would be without prejudice to the right of either party to request special findings, if he should see fit to do so, except as to the amount involved. The only issue that would be submitted would be that relating to the finding of the issues, and not as to the accounting. Mr. McInerney [attorney for petitioner]: It is further agreed, as I understand it, and the record may show, that whatever the amount is, we have tendered that amount and continue to make the tender good, and that the verdict will be, if there is a verdict, that the property be surrendered upon payment of whatever be paid for the stock, plus whatever interest charges. Mr. Leeming: Yes, I think there is no objection to that. You understand the statement that I made is proper and is agreeable to both parties? Mr. McInerney: Yes, that is agreeable. The Court: All right, bring out the jury. (Thereupon the jury resumed their seats in the jury box.)" In view of the foregoing agreement of the counsel made in open court it would seem that petitioner waived his objection to a trial by jury.

In Hanson v. Swartz, 145 III. 609, the construction of sections 81 and 82 of the Administration Act, as amended in 1925, was involved, and the court said (p. 613):

"Sections 81 and 82 of the Administration act before their amendment in 1925 created a right of recovering property which had been placed by the deceased in his lifetime in the possession of the party charged, and the remedy did not extend to the determination of a contested right or title to the property because no provision was made for the trial by jury, without which no man can be deprived, constitutionally, of his property. (Mulliven

v. Arcola State Bank, 314 Ill. 40; Martin v. Martin, 170 id. 18; Dinsmoor v. Bressler, 164 id. 211; Tappy v. Kilpatrick, 337 id. 600.) By the amendment (Laws of 1925, pp. 1, 2,) the remedy was extended to property belonging to the 'executor or administrator of the estate of any deceased person,' and power was conferred on the court to determine 'all controverted questions of title and claims of adverse title and to determine the right of property' by a trial by jury upon the demand of either party. (Johnson v. Nelson, 341 Ill. 119.)"

The court held (p. 617): "The trial in the circuit court was de novo and the court erred in overruling the demand for a jury. If on the remandment of the cause either party demands a jury trial it should be allowed." See, also, In re Est. of Vinces, 267 Ill. App. 483, decided by this Division of the court.

Section 186 of the present Illinois Probate Act (ch. 3, par. 338, Ill. Rev.Stat. 1943) provides: "Upon the demand of any party to the proceeding questions of title, claims of adverse title, and the right of property shall be determined by a jury." Under sections 81 and 82 of the old Administration Act it was frequently held that the Probate court could not hail persons into that court and dispose of their rights without giving them a trial by jury, where such persons claimed ownership in the property in question; that to permit such procedure would be an infringement of the constitutional rights of the parties to have the question of ownership determined by a jury. See Bates v. Lutz, 220 Ill. App. 54, 60, 61; In re Est. of Vinces, supra; Hansen v. Swartz, supra; Sullivan v. The Arcola State Bank, 314 Ill. 40.

The petitioner in this case prays for an order authorizing and directing the executrix to turn over to him the certificates and shares. The substance of the petition, regardless of its form, is a reclamation petition and the right to the possession of the property sought to be reclaimed is the real question involved in

v. Arcola State Bank, 314 Ill. 40; Martin v. Martin, 170 id. 18; Dinsmoor v. Dressler, 164 id. 211; Bailey v. Kilpatrick, 157 id. 600.) By the amendment (Laws of 1957, p. 1, ch. 7) the remedy was extended to property belonging to the 'executor or administrator of the estate of any deceased person,' and power was conferred on the court to determine 'all controverted questions of title and claims of adverse title and to determine the right of property' by a trial by jury upon the demand of either party. (Johnson v. Nelson, 341 Ill. 119.)'

The court held (p. 417): "The trial in the circuit court was de novo and the court erred in overruling the demand for a jury. If on the remandment of the cause either party demands a jury trial it should be allowed." See, also, In re Est. of Vinces, 267 Ill. App. 483, decided by this Division of the court.

Section 1-6 of the present Illinois Probate Act (ch. 3, par. 33, Ill. Rev. Stat. 1964) provides: "Upon the demand of any party to the proceeding questions of title, claims of adverse title, and the right of property shall be determined by a jury." Under sections 81 and 82 of the old administration act it was frequently held that the probate court could not hold persons into that court and dispose of their rights without giving them a trial by jury, where such persons claimed ownership in the property in question; that to permit such procedure would be an infringement of the constitutional rights of the parties to have the question of ownership determined by a jury. See Yates v. Yates, 220 Ill. App. 54, 61; In re Est. of Vinces, supra; Nelson v. Martin, supra; Sullivan v. The Arcola State Bank, 314 Ill. 40.

The petitioner in this case prays for an order authorizing and directing the executrix to turn over to him the certificates and shares. The substance of the petition, regardless of its form, is a reclamation petition and the right to the possession of the property sought to be reclaimed is the real question involved in

the case. Cases cited by petitioner that do not involve questions of right to possession of property are not in point. Undoubtedly there are proceedings in the Probate court where there is no right to a trial by jury. Even if it could be considered that the instant petition was in the nature of an equitable proceeding, chancellors have a discretionary power to direct that issues be tried by a jury. Section 63 of the Civil Practice Act (ch. 110, par. 187, Ill. Rev. Stat. 1941) provides: "Subject to rules providing otherwise, the court may in its discretion direct an issue or issues to be tried by a jury, whenever it shall be judged necessary in any cause in equity pending therein. In all other cases in equity, the mode of trial shall be the same as has been heretofore practiced in courts of chancery." The decretal order entered recites:

"1. The motion of the petitioner, B. K. Goodman, for a new trial in this cause be and the same is hereby overruled and a new trial denied;

"2. The motion of the petitioner, B. K. Goodman, in arrest of judgment be and the same is hereby overruled;

"3. That the petitioner, B. K. Goodman, take nothing by his suit and that the respondent, Katherine Howell McLennan, Executrix go hence without day, and that the respondent, Katherine Howell McLennan, Executrix, do have and recover of and from the petitioner, B. K. Goodman, her costs as taxed by the Clerk of this Court, and have execution therefor;

"4. That the petition of B. K. Goodman as originally filed in the Probate Court of Cook County, Illinois, and as amended and as filed herein, be and the same is hereby dismissed."

Therefore, if the petition be regarded as in the nature of a <u>quasi</u> equitable proceeding the counsel agreed to have the issue of the alleged agreement submitted to the jury, the accounting to be determined by the court, if the jury found for petitioner, and the trial court, in effect, adopted the finding of the jury and

the case. Cases cited by petitioner that do not involve questions of right to possession of property are not in point. Undoubtedly there are proceedings in the Probate court where there is no right to a trial by jury. Even if it could be considered that the instant petition was in the nature of an equitable proceeding, chancellors have a discretionary power to direct that issues be tried by a jury. Section 63 of the Civil Practice Act (ch. 110, par. 187, Ill. Rev. Stat. 1941) provides: "Subject to rules providing otherwise, the court may in its discretion direct an issue or issues to be tried by a jury, whenever it shall be judged necessary in any cause in equity pending therein. In all other cases in equity, the mode of trial shall be the same as has been heretofore practiced in courts of chancery." The decretal order entered recites:

"1. The motion of the petitioner, B. K. Goodman, for a new trial in this cause be and the same is hereby overruled and a new trial denied;

"2. The motion of the petitioner, B. K. Goodman, in arrest of judgment be and the same is hereby overruled;

"3. That the petitioner, B. K. Goodman, take nothing by his suit and that the respondent, Katherine Howell Molerman, Executrix go hence without day, and that the respondent, Katherine Howell Molerman, Executrix, do have and recover of and from the petitioner, B. K. Goodman, her costs as taxed by the Clerk of this Court, and have execution therefor;

"4. That the petition of B. K. Goodman as originally filed in the Probate Court of Cook County, Illinois, and as amended and as filed herein, be and the same is hereby dismissed."

Therefore, if the petition be regarded as in the nature of a quasi equitable proceeding the counsel agreed to have the issue of the alleged agreement submitted to the jury, the accounting to be determined by the court, if the jury found for petitioner, and the trial court, in effect, adopted the finding of the jury and

dismissed the petition.

Petitioner contends that the testimony of Weisberg and the two exhibits admitted in evidence in connection with his testimony were incompetent and immaterial evidence and prejudicial to the rights of petitioner. The record shows that the only specific objection made to the testimony was that petitioner objected "to any dealings that he [McLennan] had after the purchase." The argument made is that "the statements and acts of McLennan in the exercise of claimed ownership do not belong to such class of declarations of deceased persons; nor can they, by any stretch of the imagination be brought within the rule of statements or acts done as part of the res gestae." The specific objection made by petitioner's counsel to the evidence had no merit and we might dispose of the instant contention upon that ground. Respondent denied that there was an agreement and the evidence was offered as a circumstance tending to show that after the time of the alleged agreement and the purchase of the securities McLennan continued to exercise acts of ownership of the securities. The evidence was competent. See Abend v. Mueller, 11 Ill. App. 257, 259, 260; Jones v. Taylor, 261 Ill. App. 403, 415; Fyffe v. Fyffe, 106 Ill. 646, 648, 649; Martin v. Martin, 174 Ill. 371, 374, and cases cited therein. Petitioner, while insisting that he makes out a case by evidence as to alleged oral statements of McLellan, strenuously contends that the estate has no right to introduce in evidence statements and acts of McLellan that tend to rebut the alleged agreement. If petitioner's view of the law is sound, then the estate of McLennan has little, if any, opportunity to defend itself against the instant claim.

The contention of petitioner that the court erred in refusing to give to the jury an instruction offered by him is without merit. The instruction commences with the following words: "It is not necessary that the agreement in question in this case be in

dismissed the petition.

Petitioner contends that the testimony of Weisberg and the two exhibits admitted in evidence in connection with his testimony were incompetent and immaterial evidence and prejudicial to the rights of petitioner. The record shows that the only specific objection made to the testimony was that petitioner objected "to any dealings that he [Molenman] had after the purchase." The argument made is that "the statements and acts of Molenman in the exercise of claimed ownership do not belong to such class of declarations of deceased persons; nor can they, by any stretch of the imagination be brought within the rule of statements or acts done as part of the res gestae." The specific objection made by petitioner's counsel to the evidence had no merit and we might dispose of the instant contention upon that ground. Respondent denied that there was an agreement and the evidence was offered as a circumstance tending to show that after the time of the alleged agreement and the purchase of the securities Molenman continued to exercise acts of ownership of the securities. The evidence was competent. See Abend v. Smelley, 11 Ill. App. 297, 299; Jones v. Taylor, 261 Ill. App. 405, 415; Kytle v. Kytle, 206 Ill. 646, 648, 649; Martin v. Martin, 174 Ill. 371, 374, and cases cited therein. Petitioner, while insisting that he makes out a case by evidence as to alleged oral statements of Molenman, strenuously contends that the estate has no right to introduce in evidence statements and acts of Molenman that tend to rebut the alleged agreement. If petitioner's view of the law is sound, then the estate of Molenman has little, if any, opportunity to defend itself against the instant claim.

The contention of petitioner that the court erred in refusing to give to the jury an instruction offered by him is without merit. The instruction commences with the following words: "It is not necessary that the agreement in question in this case be in

writing, * * *" This language assumes that there was an agreement, and the vital question in the case was, Was there an agreement? Moreover, the court instructed the jury, at the request of petitioner, as follows: "If the jury believe from the evidence that McLennan entered into a legal, valid and binding agreement with Goodman to purchase the property in question for Goodman, then such agreement need not be in writing."

Satisfied, as we are, that the verdict of the jury and the decretal judgment are just, and in accordance with the evidence and the law, the decretal judgment of the Circuit court of Cook county is affirmed.

DECRETAL JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

writing, * * *" This language assumes that there was an agreement, and the vital question in the case was, Was there an agreement? Moreover, the court instructed the jury, at the request of petitioner, as follows: "If the jury believe from the evidence that McLennan entered into a legal, valid and binding agreement with Goodman to purchase the property in question for Goodman, then such agreement need not be in writing."

Satisfied, as we are, that the verdict of the jury and the decretal judgment are just, and in accordance with the evidence and the law, the decretal judgment of the Circuit court of Cook county is affirmed.

MCBRIDE, Justice, dissenting.

Friend, P. J., and Vallivan, J., concur.

42256

EMMA HILL, Appellee,

v.

NEW YORK LIFE INSURANCE COMPANY, a corporation, Appellant.

) APPEAL FROM MUNICIPAL COURT OF CHICAGO.

408 124

322 I.A. 690²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, beneficiary in a policy issued by defendant, sued to recover the additional double indemnity benefits of $3,000 on the life of William J. Kropacek, her brother. The policy was in force at the time of his death and defendant paid its face value, $3,000. A jury returned a verdict finding the issues for plaintiff and assessing her damages at $3,157. Defendant appealed from a judgment entered upon that verdict. We reversed the judgment and remanded the cause for a new trial upon the ground that the verdict of the jury was manifestly against the weight of the evidence and therefore the trial court erred in denying defendant's motion for a new trial. Thereafter there was a second trial of the cause and a jury returned a verdict for plaintiff in the sum of $3,000, with interest and costs. Defendant appeals from a judgment entered upon the verdict. Plaintiff has not filed a brief in this court.

The double indemnity clause of the policy, upon which plaintiff's claim is based, provides:

"The double indemnity * * * shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means * * *.

"Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane * * *; or directly or indirectly, from infirmity of mind or

BERTA HILL,
Appellee,

v.

NEW YORK LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM JUDICIAL
COURT OF CHICAGO.

MR. JUSTICE DANIEL DELAHAY DELIVERED THE OPINION OF THE COURT.

Plaintiff, beneficiary in a policy issued by defendant, sued to recover the additional double indemnity benefits of $3,000 on the life of William J. Hopgood, her brother. The policy was in force at the time of his death and defendant paid its face value, $3,000. A jury returned a verdict finding the issues for plaintiff and assessing her damages at $3,127. Defendant appealed from a judgment entered upon that verdict. We reversed the judgment and remanded the cause for a new trial upon the ground that the verdict of the jury was manifestly against the weight of the evidence and therefore the trial court erred in denying defendant's motion for a new trial. Thereafter there was a second trial of the cause and a jury returned a verdict for plaintiff in the sum of $3,000, with interest and costs. Defendant appeals from a judgment entered upon the verdict. Plaintiff has not filed a brief in this court.

The double indemnity clause of the policy, upon which plaintiff's claim is based, provides:

"The double indemnity * * * shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means * * *.

"Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane * * *; or directly or indirectly, from infirmity of mind or

body, from illness or disease * * *."

Defendant admitted that the policy was in force at the time of the death of Kropacek and also admitted the fact of his death. As the face value of the policy, $3,000, was paid by defendant to plaintiff, only the double indemnity provision of the policy is involved in this appeal.

The death certificate showed that the insured died on December 27, 1937, of "a crushing injury to the head" as the result of a "fall" or "jump" from an archway window on the third floor of the Peoples Hospital to the sidewalk below. The hospital is located on Cermak road (22d street) and Archer avenue, Chicago. In plaintiff's statement of claim it is alleged: "On or about December 27, 1937, while said policy was in full force and effect, said insured received personal injuries through external, violent and accidental means, to-wit: by accidental fall three stories from a fire-escape to the ground." Defendant's answer to the foregoing, in its pleading, is as follows: "The defendant denies that said death was the result of external, violent and accidental means and in particular denies that said death was the result of an accidental fall from a fire-escape and avers that said death resulted from self-destruction while said insured was sane or insane and, hence, was not a death within the meaning of the double indemnity provisions of said policy or contract upon which the plaintiff sues." After the verdict on the first trial plaintiff was allowed to amend her pleading by striking the words,"by accidental fall three stories from a fire-escape to the ground," and to insert in place thereof the words,"by accidental death immediately caused and resulting from a crushed head accidentally received and suffered and not self-inflicted while sane or insane."

Defendant contends that the only reasonable inference

body, from illness or disease * * *."

Defendant admitted that the policy was in force at the time of the death of Koopsen and also admitted the fact of his death. As the face value of the policy, $2,000, was paid by defendant to plaintiff, only the double indemnity provision of the policy is involved in this appeal.

The death certificate showed that the insured died on December 27, 1937, of "a crushing injury to the head" as the result of a "fall" or "jump" from an archway window on the third floor of the Peoples Hospital to the sidewalk below.

The hospital is located on Grand road (Ogden street) and Archer avenue, Chicago. In plaintiff's statement of claim it is alleged: "On or about December 27, 1937, while said policy was in full force and effect, said insured received personal injuries through external, violent and accidental means, to-wit: by accidental fall three stories from a fire-escape to the ground." Defendant's answer to the foregoing, in its pleading, is as follows: "The defendant denies that said death was the result of external, violent and accidental means and in particular denies that said death was the result of an accidental fall from a fire-escape and avers that said death resulted from self-destruction while said insured was sane or insane and, hence, was not a death within the meaning of the double indemnity provisions of said policy or contract upon which the plaintiff sues." After the verdict on the first trial plaintiff was allowed to amend her pleading by striking the words, "by accidental fall three stories from a fire-escape to the ground," and to insert in place thereof the words, "by accidental death immediately caused and resulting from a crushed head accidentally received and suffered and not self-inflicted while sane or insane."

Defendant contends that the only reasonable inference

from the evidence is that the insured, while confined on the third floor of a hospital, suffering from a depressed mental state, conducive to suicide, came to his death from a crushing injury to his head after he had jumped from the third floor of the hospital, dressed in his hospital nightgown, to a point fourteen feet off from the building line to the sidewalk pavement below, on 22d street, and that the trial court should have directed a verdict for defendant. While this contention is very forcibly argued, we have concluded that it cannot be sustained. But defendant raises another contention that is clearly a meritorious one, viz., that the trial court erred in overruling its motion for a new trial as the verdict was against the manifest weight of the evidence.

We will briefly state material evidence in the case that bears upon the controlling question, Did the insured's death result from self-destruction, whether sane or insane?

Frederick Charles Francis testified that he was the manager of mail and express traffic of the Chicago, Rock Island and Pacific Railroad and that the deceased had been working in his department since 1921; that in December, 1937, he sent the deceased to Omaha on business for the company; that the deceased was taken ill there and was unable to stay the number of days necessary to do his work; that on the evening of December 23, 1937, he went to the home of the deceased and talked with the latter, who was then in bed; that he sat down by the bedside and asked him about his trip to Omaha and Kropacek told him he had been taken ill in Omaha, had consulted a doctor, and that he decided to go home and left Omaha that evening; that the deceased "said he wanted to talk to me because he had something on his mind. I asked him if it was in connection with his work at the office and he said, 'No, nothing like that.' So I asked him what it was. And he said, 'Well, I can't tell you.' And I

from the evidence is that the insured, while confined on the third floor of a hospital, suffering from a depressed mental state, conducive to suicide, came to his death from a crushing injury to his head after he had jumped from the third floor of the hospital, dressed in his hospital nightgown, to a point fourteen feet off from the building line to the sidewalk pavement below, on 22d street, and that the trial court should have directed a verdict for defendant. While this contention is very forcibly argued, we have considered that it cannot be sustained. But defendant raises another proposition that is clearly a meritorious one, viz., that the trial court erred in overruling its motion for a new trial as the verdict was against the manifest weight of the evidence.

We will briefly state material evidence in the case that bears upon the controlling question, did the insured's death result from self-destruction, whether sane or insane?

Frederick Charles Francis testified that he was the manager of mail and express traffic of the Chicago, Rock Island and Pacific Railroad and that the deceased had been working in his department since 1921; that in December, 1927, he sent the deceased to Omaha on business for the company; that the deceased was taken ill there and was unable to stay the number of days necessary to do his work; that on the evening of December 23, 1927, he went to the home of the deceased and talked with the latter, who was then in bed; that he sat down by the bedside and asked him about his trip to Omaha and Crosman told him he had been taken ill in Omaha, had consulted a doctor, and that he decided to go home and left Omaha that evening; that the deceased "said he wanted to talk to me because he had something on his mind. I asked him if it was in connection with his work at the office and he said, 'No, nothing like that.' So I asked him what it was. And he said, 'Well, I can't tell you.' And I

said, 'Why can't you tell me?' He said, 'I can't tell anybody.' So, I asked couldn't he tell his brother or mother or sister. He said, no, he couldn't tell anybody but it was something that was bothering him and on his mind;" that he advised the deceased to send for the priest and have a talk with him, and, if possible, tell him what was the trouble, and the deceased said that was a good idea; that he said to the deceased: "Probably by next Monday you will be able to come back to the office," to which the deceased replied: "No, I will never be back. * * * No, I am through and will never be back," and he tapped his heart and said, "My ticker;" that the deceased said "he seemed to see all humanity passing in review before him like starting from Adam, they would start from the left and come down in front of him and disappear into oblivion on the right. I thought that was just a hallucination he had. He was rather depressed."

Roland P. Mackay testified that he was a physician and specialized in diseases of the mind; that he graduated in 1925 and spent a year as an interne at the Henry Ford Hospital in Detroit, from 1925 to 1926; that he spent the next three years as a Fellow in Neurology and Psychiatry at the Mayo Foundation, at Rochester, Minnesota; that in 1929 he came to Chicago and has been specializing in nervous and mental diseases since that time; that he is an Associate Professor of Neurology at the University of Illinois; that on the day before the death of Kropacek he was called to the Kropacek home; that he made an examination of Kropacek; that there were present at the examination two or three brothers of the deceased, his mother, and two or three women; that in addition to making a physical examination of the deceased he talked with him and asked him a great many questions about his state of mind; that after he had examined and talked with the deceased he made his diagnosis, which was that the deceased was in a severe state of agitated

said, 'Why can't you tell me?' He said, 'I can't tell anybody.' So, I asked couldn't he tell his brother or mother or sister. He said, no, he couldn't tell anybody but it was something that was bothering him and on his mind;" that he advised the deceased to send for the priest and have a talk with him, and, if possible, tell him what was the trouble, and the deceased said that was a good idea; that he said to the deceased: "Probably by next Monday you will be able to come back to the office," to which the deceased replied: "No, I will never be back. * * * No, I am through and will never be back," and he tapped his heart and said, "My ticker;" that the deceased said "he seemed to see all necessity passing in review before him like starting from Adam, they would start from the left and come down in front of him and disappear into oblivion on the right. I thought that was just a hallucination he had. He was rather depressed."

Roland P. Mabry testified that he was a physician and specialized in diseases of the mind; that he graduated in 1925 and spent a year as an interne at the Henry Ford Hospital in Detroit, from 1925 to 1926; that he spent the next three years as a fellow in Neurology and Psychiatry at the Mayo Foundation, at Rochester, Minnesota; that in 1929 he came to Chicago and has been specializing in nervous and mental diseases since that time; that he is an associate professor of Neurology at the University of Illinois; that on the day before the death of Kropacek he was called to the Kropacek home; that he made an examination of Kropacek; that there were present at the examination two or three brothers of the deceased, his mother, and two or three women; that in addition to making a physical examination of the deceased he talked with him and asked him a great many questions about his state of mind; that after he had examined and talked with the deceased he made his diagnosis, which was that the deceased was in a severe state of agitated

depression; that the deceased was crying and moaning, wringing his hands, and saying that he was finished, that there was not any hope in life for him and he wanted to do away with himself and he could not see any reason for living any longer; that the deceased was pacing up and down the floor, wringing his hands and bemoaning his fate; that the witness was asked to see the deceased by Dr. N. C. Gilbert, who had already seen the deceased and recognized that it was a mental case, and he asked the witness to see the deceased because the witness made a specialty of mental cases; that the witness recommended to the relatives that the deceased be put either in the Psychopathic Hospital or in a private hospital for the care of mental conditions; that he was very explicit in telling the relatives the dangers in the case; that he told the relatives that if they could not get him into the Psychopathic Hospital he should be taken to Mercyville, which is an institution for the care of patients who are depressed; that the deceased was not suffering from physical disease in the body but was suffering from a disease of the mind; that it was a definite mental disease that required months before it disappeared; that the deceased "was pacing up and down the floor, wringing his hands without any reason and running his fingers through his hair, saying he was done for and there wasn't any hope for him and expressing a desire to do away with himself. Those are not normal things for people to do and when a man does that we call it agitated depression." Upon cross-examination the witness stated that "there was no question of the diagnosis or recommendation and I didn't call in any other neurologist. * * * The only diagnosis I had to make was, is this man dangerous to himself or others? There was no doubt about it. The relatives knew that or they would not have had me there. It was perfectly obvious on examination that this man was in need of hospital care;" that

depression; that the deceased was crying and moaning, wringing his hands, and saying that he was finished, that there was not any hope in life for him and he wanted to do away with himself and he could not see any reason for living any longer; that the deceased was pacing up and down the floor, wringing his hands and bemoaning his fate; that the witness was asked to see the deceased by Dr. H. G. Gilbert, who had already seen the deceased and recognized that it was a mental case, and he asked the witness to see the deceased because the witness made a speciality of mental cases; that the witness recommended to the relatives that the deceased be put either in the Psychopathic Hospital or in a private hospital for the care of mental conditions; that he was very explicit in telling the relatives the dangers in the case; that he told the relatives that if they could not get him into the Psychopathic Hospital he should be taken to Kerrville, which is an institution for the care of patients who are depressed; that the deceased was not suffering from physical disease in the body but was suffering from a disease of the mind; that it was a definite mental disease that required months before it disappeared; that the deceased "was pacing up and down the floor, wringing his hands without any reason and running his fingers through his hair, saying he was done for and there wasn't any hope for him and expressing a desire to do away with himself. Those are not normal things for people to do and when a man does that we call it agitated depression." Upon cross-examination the witness stated that "there was no question of the diagnosis or recommendation and I didn't call in any other neurologist. * * * The only diagnosis I had to make was, is this man dangerous to himself or others? There was no doubt about it. The relatives knew that or they would not have had me there. It was perfectly obvious on examination that this man was in need of hospital care;" that

the family paid him ten dollars for the examination. Upon redirect the witness stated that "these other men were in the room trying to calm him and keep him quiet and make him be still and holding on to him to restrain him. When I came in he was in this agitated state. Unless somebody held him every minute he was walking up and down the floor and not remaining in bed as these relatives thought he should."

Jeanne Adams, a witness called on behalf of plaintiff, in rebuttal testified that at the time in question she was the superintendent of nurses at the Peoples Hospital; that she talked with Kropacek for the purpose of trying to find out what was really wrong with him because he did not seem to be actively ill; that Kropacek said to her, "Oh, if I had a gun I would shoot myself;" that he said he was depressed, that "life wasn't sweet enough for him anymore or something to that effect."

Joseph Kropacek, a brother of the deceased, called as a witness by defendant, was a reluctant witness but he was forced to make admissions that supported defendant's theory as to the mental condition of the deceased prior to his death. He testified that the deceased told him that he had not slept for several weeks. Asked if he had not stated at the coroner's inquest held the day after his brother's death, "I would say that he lost his mind, and the last couple of days he wasn't himself," he answered, "I might have said it," but that he was all excited after the death of his brother. The witness further testified that on the day before the deceased died the latter came downstairs and stated that he was going out. "Q. What did he say? A. He just said he was going out, and I didn't consider - well, I did know he was mentally upset at that time. * * * I just asked him to come upstairs and of course I will say he was in no condition to run outside." The witness further testified that upon the day the deceased

the family paid him ten dollars for the examination. Upon redirect the witness stated that "the other men were in the room trying to calm him and keep him quiet and make him be still and holding on to him to restrain him. When I came in he was in this agitated state. Unless somebody held him every minute he was walking up and down the floor and not remaining in bed as these relatives thought he should."

Jeanne Adams, a witness called on behalf of plaintiff, in rebuttal testified that at the time in question she was the superintendent of nurses at the People Hospital; that she talked with Kropacek for the purpose of trying to find out what was really wrong with his nerves; he did not seem to be actively ill; that Kropacek said to her, "Oh, if I had a gun I would shoot myself;" that he said he was depressed, that "life wasn't sweet enough for him anymore or something to that effect."

Joseph Kropacek, a brother of the deceased, called as a witness by defendant, was a reluctant witness but he was forced to make admissions that supported defendant's theory as to the mental condition of the deceased prior to his death. He testified that the deceased told him that he had not slept for several weeks. Asked if he had not stated at the coroner's inquest held the day after his brother's death, "I would say that he lost his mind, and the last couple of days he wasn't himself," he answered, "I might have said it," but that he was all excited after the death of his brother. The witness further testified that on the day before the deceased died the latter came down-stairs and stated that he was going out. "Q. What did he say? A. He just said he was going out, and I didn't consider - well, I did know he was mentally upset at that time. * * * I just asked him to come upstairs and of course I will say he was in no condition to run outside."

The witness further testified that upon the day the deceased

came back from Omaha he said, "Joe, will you get me my gun;" that he stuck pretty close to the deceased after he came back from Omaha; that he, the witness, knew Dr. Mackay was a specialist in nervous diseases when he called him to see his brother.

The clinical record of the hospital, introduced by plaintiff, shows the following notation, made by one of the nurses, "Talk peculiar."

Defendant offered in evidence certain photographs of the Peoples Hospital. These photographs and certain other evidence show that the hospital is a four-story building that faces north on Cermak road, or 22d street; that on the third floor is a corridor which opens out onto a porch that covers the entire east end of the building; that the porch is about eight feet in width and has a floor of corrugated or rough steel "with notches in it;" that it has a fire escape at the south end and an archway window at the north end; that the bottom ledge of the archway window is three feet, three or four inches, from the floor of the porch; that the concrete block which forms the bottom of the archway window ledge is fourteen inches across; that the distance from the bottom of the archway window to the sidewalk below is thirty feet, two inches; and that the width of the sidewalk directly opposite the archway window, on the 22d street or Cermak road side, is sixteen feet, four or five inches. The evidence shows that a nurse who came on duty at 7 o'clock Monday morning, the day after he was admitted, saw the patient shortly afterward in his bed in his room, located on the third floor and in the middle of the hospital. A few minutes later he was missed from his room and his body was found by the hospital janitor in front of the hospital on the sidewalk of 22d street at a point fourteen feet and two inches out from the building line and directly opposite the third floor porch window or archway on the east side of the hospital.

came back from Omaha he said, "Joe, will you get me my gun;" that he stuck pretty close to the deceased after he came back from Omaha; that he, the witness, knew Dr. Mackay was a specialist in nervous diseases when he called him to see his brother.

The clinical record of the hospital, introduced by plaintiff, shows the following notation, made by one of the nurses, "Talk peculiar."

Defendant offered in evidence certain photographs of the Jewish hospital. These photographs and certain other evidence show that the hospital is a four-story building that faces north on Germak road, or 22d street; that on the third floor is a corridor which opens out onto a porch that covers the entire east end of the building; that the porch is about eight feet in width and has a floor of corrugated or rough steel "with notches in it;" that it has a fire escape at the south end and an archway window at the north end; that the bottom ledge of the archway window is three feet, three or four inches, from the floor of the porch; that the concrete block which forms the bottom of the archway window ledge is fourteen inches across; that the distance from the bottom of the archway window to the sidewalk below is thirty feet, two inches; and that the width of the sidewalk directly opposite the archway window, on the 22d street or Germak road side, is sixteen feet, four or five inches. The evidence shows that a nurse who came on duty at 7 o'clock Monday morning, the day after he was admitted, saw the patient shortly afterward in his bed in his room, located on the third floor and in the middle of the hospital. A few minutes later he was missed from his room and his body was found by the hospital janitor in front of the hospital on the sidewalk of 22d street at a point fourteen feet and two inches out from the building line and directly opposite the third floor porch window or archway on the east side of the hospital.

He was dressed in his hospital nightgown. The body was no closer than fourteen feet from the building line. The head was crushed in and one eye was almost "popped out." He was dead from a crushing injury to the head.

Rufus Oldenburger, a professor of mathematics and dynamics at the Illinois Institute of Technology, formerly the Armour Institute of Technology, stated that he was a graduate of the University of Chicago and that he had been a member of the Institute for Advanced Study at Princeton University where he had studied under Professor Albert Einstein; that he had done special work in the field of kinetic energy, that is, the energy that takes projectiles through paths; that he had done quite a special work in that field; that he had done practical work in that field for the Byrd Antartic Expedition; that he was to work for the United States Government in ballistics, which is the determination of the paths of projectiles which are fired from guns; that kinetic energy is energy due to motion, that is, the energy which enables a body or a given mass to travel at a given velocity. The witness testified, in substance, that the amount of propulsion force necessary to carry a body of the size and weight of the insured from the third floor height to a point fourteen feet out from the building line was 234 foot pounds of kinetic energy; that this would be the equivalent of a standing broad jump of four feet four inches; that when the body hit the pavement it would be traveling at thirty miles an hour, and when it hit and there was a crushing injury to the head there would be no bounce.

As plaintiff has not filed a brief in this court we have been compelled to search the record to find out how plaintiff met the evidence of defendant that tended to show that the deceased, while suffering from a depressed mental state conducive to self-destruction, came to his death by self-destruction while

He was dressed in his hospital nightgown. The body was no closer than fourteen feet from the building line. The head was crushed in and one eye was almost "popped out." He was dead from a crushing injury to the head.

Burns Oldenburger, a professor of mathematics and dynamics at the Illinois Institute of Technology, formerly the Armour Institute of Technology, stated that he was a graduate of the University of Chicago and that he had been a member of the Institute for Advanced Study at Princeton University where he had studied under Professor Albert Einstein; that he had done special work in the field of kinetic energy, that is, the energy that takes projectiles through paths; that he had done quite a special work in that field; that he had done practical work in that field for the Ford automatic expedition; that he was to work for the United States Government in ballistics, which is the determination of the path of projectiles which are fired from guns; that kinetic energy is energy due to motion, that is, the energy which enables a body of a given mass to travel at a given velocity. The witness testified, in substance, that the amount of propulsion force necessary to carry a body of the size and weight of the insured from the third floor height to a point fourteen feet out from the building line was 234 foot pounds of kinetic energy; that this would be the equivalent of a standing broad jump of four feet four inches; that when the body hit the pavement it would be travelling at thirty miles an hour, and when it hit and there was a crushing injury to the head there would be no bounce.

As plaintiff has not filed a brief in this court we have been compelled to search the record to find out how plaintiff met the evidence of defendant that tended to show that the deceased, while suffering from a depressed mental state sometimes to self-destruction, came to his death by self-destruction while

sane or insane, and we find that plaintiff relied practically upon the following evidence: The clinical record shows notations that indicate that at 10 p. m. December 26 two allonal tablets were given to the deceased, but the nurse who made the notation on the record was not called as a witness. The head nurse testified, "I presume he got them." She further testified that all neurotics are searched when they come into the hospital, for drugs, and that the deceased had no opportunity to obtain drugs in the hospital. We may assume that the deceased was given two allonal tablets at 10 p. m. December 26. Plaintiff called as a witness Dr. Frank Fremmel, who testified that the purpose for which allonal is given is to produce sleep; that after a patient who has been given allonal has had a sound sleep and has been aroused he might go into a condition of a sort of twilight sleep, in which he is partially conscious of his surroundings; that this does not always follow; that some people may within ten or twelve hours be clearly cognizant of their environment and be in a good state of equilibrium, and another patient might take it and might not be in a clear state of equilibrium for a period of over thirty-six hours; that it is variable in its action. Upon cross-examination the witness testified that allonal is a very common prescription for inducing sleep and that he frequently prescribes it for sleep or as a sedative. "Q. You wouldn't expect a man you gave a couple of allonal tablets to get up in his nightgown and then walk around and climb up three feet two inches and jump out fourteen feet? If you did, you wouldn't give that allonal tablet, would you? A. You are right." The witness further testified that a prescription of two allonal tablets before retiring at night in the case of a man who suffered a nervous breakdown and agitated depression was not an excessive prescription; that it is a normal prescription "given by Doctors all over the United States wherever

sane or insane, and we find that plaintiff relied practically upon the following evidence: The clinical record shows notations that indicate that at 10 p. m. December 26 two allonal tablets were given to the deceased, but the nurse who made the notation on the record was not called as a witness. The head nurse testified, "I presume he got them." She further testified that all narcotics are searched when they come into the hospital, for drugs, and that the deceased had no opportunity to obtain drugs in the hospital. We may assume that the deceased was given two allonal tablets at 10 p. m. December 26. Plaintiff called as a witness Dr. Frank Freeman, who testified that the purpose for which allonal is given is to produce sleep; that after a patient who has been given allonal has had a sound sleep and has been aroused he might go into a condition of a sort of twilight sleep, in which he is partially conscious of his surroundings; that this does not always follow; that some people may within ten or twelve hours be clearly cognizant of their environment and be in a good state of equilibrium, and another patient might take it and might not be in a clear state of equilibrium for a period of over thirty-six hours; that it is variable in its action. Upon cross-examination the witness testified that allonal is a very common prescription for inducing sleep and that he frequently prescribes it for sleep or as a sedative. "Q. You wouldn't expect a man you gave a couple of allonal tablets to get up in his nightgown and then walk around and climb up three feet two inches and jump out fourteen feet? If you did, you wouldn't give that allonal tablet, would you? A. You are right." The witness further testified that a prescription of two allonal tablets before retiring at night in the case of a man who suffered a nervous breakdown and agitated depression was not an excessive prescription; that it is a normal prescription "given by Doctors all over the United States wherever

allonal is used;" that allonal is a soporific and its normal action is to produce sleep; that "allonal doesn't act like ether. You don't get any stimulating period from allonal like you do in the use of alcohol;" that allonal and ether are entirely different agents and have entirely different effects; that "there is no idiosyncrasy to allonal that would develop an exhilarating effect or stimulating effect;" that a patient who has been given two grains of allonal should not be allowed to go around and drive an automobile the next day. The witness further testified that he had never had a suicide from allonal, but that he had heard of suicide from allonal; that he never has known of a person to take a couple of allonal tablets and go up and climb on a wall and jump out fourteen feet. "Q. Suppose a man had a hangover and climbed up on a three feet two inch wall and got up on a stone or ledge in his nightgown and threw his body forward in a jump far enough to take his body out fourteen feet two inches out and thirty feet below, he would do that in spite of the allonal? A. Your judgment is as good as mine on that." The witness further testified that he had never observed a case where allonal produced enough energy to carry a body out fourteen feet from a height of thirty feet. The clinical record shows that the deceased stated to a nurse at 7 a. m. December 27 that he felt much better and that he had a good night. This statement was made just a few minutes before he was missed.

Two juries have found a verdict for plaintiff, and in our consideration of the evidence we have given due consideration to that fact, but a careful study of the evidence satisfies us that the contention of defendant that the verdict is against the manifest weight of the evidence must be sustained.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

alional is used;" that alional is a narcotic and its normal action is to produce sleep; that "alional doesn't act like ether. You can't get any stimulating period from alional like you do in the use of alcohol;" that alional and ether are entirely different agents and have entirely different effects; that "there is no idiosyncrasy to alional that would develop an exhilarating effect or stimulating effect;" that a patient who has been given two grains of alional should not be allowed to go around and drive an automobile the next day. The witness further testified that he had never had a suicide from alional, but that he had heard of suicide from alional; that he never had known of a person to take a couple of alional tablets and go up and climb on a wall and jump and fourteen feet. "Q. Suppose a man had a hangover and climbed up on a three feet two inch wall and got up on a stone or ledge in his nightgown and threw his body forward in a jump far enough to take his body out fourteen feet two inches out and thirty feet below, he would do that in spite of the alional? A. Your judgment is as good as mine on that.' The witness further testified that he had never observed a case where alional produced enough energy to carry a body out fourteen feet from a height of thirty feet. The clinical record shows that the deceased checked to a nurse at 7 a. m. December 27 that he felt much better and that he had a good night. This statement was made just a few minutes before he was missed.

Two juries have found a verdict for plaintiff, and in our consideration of the evidence we have given due consideration to that fact, but a careful study of the evidence satisfies us that the contention of defendant that the verdict is against the manifest weight of the evidence must be sustained.

The judgment of the municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Friend, P. J., and Matchett, J., concur.

42878

403 125

RAE MICHELSON,
Appellant,

v.

MANDEL BROTHERS, INC.,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

322 I.A. 691

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for damages for personal injuries sustained by plaintiff. There was a trial before the court and a jury and at the close of plaintiff's evidence the trial court upon motion of defendant directed the jury to find a verdict of not guilty. Plaintiff appeals from a judgment entered upon the verdict.

The complaint alleges, in substance, that on July 13, 1940, defendant, Mandel Brothers, Inc., operated a department store in Chicago; that plaintiff was shopping in said store on said date and that she was walking down a stairway to a sub-basement; that she was in the exercise of due care and caution for her own safety; that it then and there became and was the duty of defendant to exercise ordinary care and caution in and about the management of the premises, and to keep it in a reasonably safe condition for plaintiff and other persons going into said store for the purpose of purchasing merchandise and other products, and not to permit slippery material to remain on the floor and stairway of said premises, but defendant, on the date aforesaid, through its agents and servants, carelessly, negligently and wrongfully permitted and allowed certain slippery material to remain on said stairway, which was dangerous when plaintiff or other persons would walk on said stairway, all of which defendant well knew, or in the exercise of all due care and caution should have known, and of which plaintiff did not have equal knowledge; that because of the negligence of defendant, through its agents and servants in that behalf, as

42878

RAE MICHELSON,
Appellant,

v.

MANDEL BROTHERS, INC.,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF COOK COUNTY.

392LA.291

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for damages for personal injuries sustained by plaintiff. There was a trial before the court and a jury and at the close of plaintiff's evidence the trial court upon motion of defendant directed the jury to find a verdict of not guilty. Plaintiff appeals from a judgment entered upon the verdict.

The complaint alleges, in substance, that on July 13, 1940, defendant, Mandel Brothers, Inc., operated a department store in Chicago; that plaintiff was shopping in said store on said date and that she was walking down a stairway to a basement; that she was in the exercise of due care and caution for her own safety; that it then and there became and was the duty of defendant to exercise ordinary care and caution in and about the management of the premises, and to keep it in a reasonably safe condition for plaintiff and other persons going into said store for the purpose of purchasing merchandise and other products, and not to permit slippery material to remain on the floor and stairway of said premises, but defendant, on the date aforesaid, through its agents and servants, carelessly negligently and wrongfully permitted and allowed certain slippery material to remain on said stairway, which was dangerous when plaintiff or other persons would walk on said stairway, all of which defendant well knew, or in the exercise of all due care and caution should have known, and of which plaintiff did not have equal knowledge; that because of the negligence of defendant, through its agents and servants in that behalf, as

plaintiff was ~~near~~ on the stairs leading down to the sub-basement of said premises, she was caused to slip and fall; "that by means and in consequence of said negligence as aforesaid, and as a direct and proximate result of said negligence, plaintiff was thereby greatly injured and her body was greatly bruised, lacerated, and injured," etc., to the damage of plaintiff in the sum of $5,000. The answer of defendant denies that plaintiff was in the exercise of due care and caution for her own safety; denies that it, or its agent and servant carelessly, negligently and wrongfully permitted and allowed certain slippery material or any dangerous substance to remain on said stairway, or any place else on the premises; denies that in the exercise of due care and caution it could, or should have known of any such alleged condition, if any such existed, and states that if any such condition existed, plaintiff should have known about it herself.

Plaintiff testified that on July 13, 1940, she and her friend, Mrs. Golub, entered defendant's department store and that she, plaintiff, purchased some hosiery; that they then started down a wide marble stairway to the lower subway; that the stairway is divided into two sections; that "as you go down you come to a platform, and then you turn and you go down another flight of stairs;" that the accident occurred on the third or fourth step from the platform, on the second flight of stairs; that when she got to the third step of the second flight of stairs her "right foot felt a slippery substance under it, and I slipped and hit my head and back, and went all of the way down to the foot of the stairs;" that "I had trouble when I stepped on the soft substance which was on the third or fourth step. The substance was not sticky because it did not adhere to the sole of my foot. It was the only thing that caused me to slip and fall. After I got down to

plaintiff was ~~xxxx~~ on the stairs leading down to the ba-
sement of said premises, she was caused to slip and fall;
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states that if any such condition existed, plaintiff should
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Plaintiff testified that on July 13, 1940, she and her
friend, Mrs. Colub, entered defendant's department store and
that she, plaintiff, purchased some hosiery; that they then
started down a wide marble stairway to the lower subway; that
the stairway is divided into two sections; that "as you go
down you come to a platform, and then you turn and you go
down another flight of stairs;" that the accident occurred
on the third or fourth step from the platform, on the second
flight of stairs; that when she got to the third step of the
second flight of stairs her right foot felt a slippery sub-
stance under it, and I slipped and hit my head and back, and
went all of the way down to the foot of the stairs;" that "I
had trouble when I stepped on the soft substance which was on
the third or fourth step. The substance was not sticky because
it did not adhere to the sole of my foot. It was the only
thing that caused me to slip and fall. After I got down to

the bottom of the steps I did not look at my sole to see what it was. * * * I don't know how long this soft, slippery substance had been on the stairway." Plaintiff also gave testimony as to the injuries she sustained. Mrs. Golub testified that as they were walking down the stairway plaintiff fell against her and then fell to the bottom of the stairway, but she did not testify as to the soft, slippery substance that plaintiff testified caused her to fall. Plaintiff offered no evidence tending to prove that defendant had either actual or constructive notice that the soft, slippery substance was on the stairway. It was because plaintiff's proof failed to show notice that the trial court instructed the jury to find a verdict for defendant. The complaint alleged that defendant negligently and wrongfully permitted and allowed certain slippery material to remain on the stairway, "all of which the defendant well knew, or in the exercise of all due care and caution should have known." In order to make out a prima facie case it was necessary for plaintiff to introduce evidence that would tend to support this allegation.

Plaintiff, in her brief filed in this court, contends that the court erred in directing the jury at the close of plaintiff's evidence to return a verdict of not guilty, but she avoidsall reference to the ground upon which the trial court gave the instruction in question to the jury. Her counsel insists that when plaintiff showed there was a soft, slippery substance on the stairway and that plaintiff fell on it and was injured thereby, and that she was in the exercise of ordinary care for her own safety at the time, she made out a prima facie case. This contention is, of course, unsound. Defendant contends that as plaintiff offered no proof as to notice, either actual or implied, she failed to make out a prima facie case of negligence against defendant and therefore

the bottom of the steps I did not look at my soles to see what it was. * * * I don't know how long this soft, slippery substance had been on the stairway." Plaintiff also gave testimony as to the injuries she sustained. Mrs. Golub testified that as they were walking down the stairway plaintiff fell against her and then fell to the bottom of the stairway, but she did not testify as to the soft, slippery substance that plaintiff testified caused her to fall. Plaintiff offered no evidence tending to prove that defendant had either actual or constructive notice that the soft, slippery substance was on the stairway. It was because plaintiff's proof failed to show notice that the trial court instructed the jury to find a verdict for defendant. The complaint alleged that defendant negligently and wrongfully permitted and allowed certain slippery material to remain on the stairway, "all of which the defendant well knew, or in the exercise of all due care and caution should have known." In order to make out a prima facie case it was necessary for plaintiff to introduce evidence that would tend to support this allegation.

Plaintiff, in her brief filed in this court, contends that the court erred in directing the jury at the close of plaintiff's evidence to return a verdict of not guilty, but she avoids all reference to the ground upon which the trial court gave the instruction in question to the jury. Her counsel insists that when plaintiff showed there was a soft, slippery substance on the stairway and that plaintiff fell on it and was injured thereby, and that she was in the exercise of ordinary care for her own safety at the time, she made out a prima facie case. This contention is, of course, unsound. Defendant contends that as plaintiff offered no proof as to notice, either actual or implied, she failed to make out a prima facie case of negligence against defendant and therefore

the action of the trial court in directing a verdict was justified. The contention of defendant is a meritorious one. It is the settled law that it was necessary for plaintiff to allege and prove that defendant knew of the slippery substance upon the stairway, or that said slippery substance was upon the stairway for a period of time from which it might be inferred that defendant by exercising ordinary care could have learned of the same. See Fier v. Chicago Orpheum Co., 295 Ill. App. 247, 262; Thorne v. Chicago Orpheum Co., 306 Ill. App. 276; Antibus v. W. T. Grant Co., 297 Ill. App. 363. The first two cases were decided by this Division of the court. Other cases to the same effect might be cited if it were necessary.

The trial court was justified in directing the jury to find a verdict of not guilty and the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

the action of the trial court in directing a verdict was justified. The construction of defendant is a restrictive one. It is the settled law that it was necessary for plaintiff to allege and prove that defendant knew of the slippery substance upon the stairway, or that said slippery substance was upon the stairway for a period of time from which it might be inferred that defendant by exercising ordinary care could have learned of the same. See Pier v. Chicago Tribune Co., 297 Ill. App. 247, 262; Thorpe v. Chicago Dryers Co., 306 Ill. App. 476; Anthus v. R. T. Grant Co., 297 Ill. App. 363. The first two cases were decided by this Division of the court. Other cases to the same effect might be cited if it were necessary.

The trial court was justified in directing the jury to find a verdict of not guilty and the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

42220

404,26

CHARLES TIDHOLM,
Appellant,

v.

AMY D. TIDHOLM, individually and as executrix of the instrument purported to be the last will and testament of AUGUST TIDHOLM, deceased, and BRUCE TIDHOLM and LOIS EWING,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

322 I.A. 691

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by plaintiff, Charles Tidholm, seeks to reverse an order of the trial court, which allowed the motion of defendants Bruce Tidholm and Lois Ewing, who had filed a disclaimer, that the cause be dismissed as to them.

August Tidholm died November 9, 1940. An instrument purporting to be his last will, in which his daughter, Amy D. Tidholm, was named executrix, was admitted to probate in the Probate court of Cook county on February 24, 1941. In and by said will the decedent bequeathed a legacy of $100 to his son, Charles Tidholm, and he gave, devised and bequeathed the residue of his estate to his daughter, Amy D. Tidholm. His only heirs at law were his four children, Charles Tidholm, Amy D. Tidholm, Bruce Tidholm and Lois Ewing.

On November 22, 1941 Charles Tidholm filed a complaint in the Circuit court to set aside the instrument that had been admitted to probate as the last will of August Tidholm because of the alleged mental incapacity of the decedent and also because of the alleged fraud and undue influence of Amy D. Tidholm. An answer was filed by the defendant, Amy D. Tidholm. Bruce Tidholm and Lois Ewing were also made defendants and properly served with summons. The complaint contained no charges of wrongful conduct as to them and they filed the following disclaimer:

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| CHARLES TIDHOLM, Appellant, | |
| v. | APPEAL FROM CIRCUIT |
| AMY D. TIDHOLM, individually and as executrix of the instrument purported to be the last will and testament of AUGUST TIDHOLM, deceased, and BRUCE TIDHOLM and LOIS EWING, Appellees. | COURT, COOK COUNTY. |

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by plaintiff, Charles Tidholm, seeks to reverse an order of the trial court, which allowed the motion of defendants Bruce Tidholm and Lois Ewing, who had filed a disclaimer, that the cause be dismissed as to them.

August Tidholm died November 2, 1940. An instrument purporting to be his last will, in which his daughter, Amy D. Tidholm, was named executrix, was admitted to probate in the probate court of Cook county on February 24, 1941. In and by said will the decedent bequeathed a legacy of $100 to his son, Charles Tidholm, and he gave, devised and bequeathed the residue of his estate to his daughter, Amy D. Tidholm. His only heirs at law were his four children, Charles Tidholm, Amy D. Tidholm, Bruce Tidholm and Lois Ewing.

On November 22, 1941 Charles Tidholm filed a complaint in the circuit court to set aside the instrument that had been admitted to probate as the last will of August Tidholm because of the alleged mental incapacity of the decedent and also because of the alleged fraud and undue influence of Amy D. Tidholm. An answer was filed by the defendant, Amy D. Tidholm. Bruce Tidholm and Lois Ewing were also made defendants and properly served with summons. The complaint contained no charges of wrongful conduct as to them and they filed the following disclaimer:

"These defendants disclaim all right, title and interest in and to said estate and in and to the purported last will of August Tidholm, deceased, in the said complaint mentioned and every part thereof; and pray to be dismissed with their reasonable costs and charges in this behalf wrongfully sustained.

Bruce Tidholm
Lois Ewing"

In response to the motion of said Bruce Tidholm and Lois Ewing the following order was entered:

"And it appearing that defendants Bruce Tidholm and Lois Ewing have filed a disclaimer of any interest in the subject matter of this suit, IT IS FURTHER ORDERED, that said cause be dismissed as to them."

Being heirs at law, Bruce Tidholm and Lois Ewing were necessary parties to this proceeding under the Administration of Estates Act. (Sec. 91, par. 243, chap. 3, Ill. Rev. Stat. 1941.) While it was the duty of plaintiff to make them parties to this suit, there is no reason why they should be compelled to remain in this case as defendants and be subjected to the expense of following this litigation to its conclusion when they disclaim any interest in the subject matter thereof. Plaintiff suggests that, if they want to avoid the expense of defending the suit, they should be compelled to submit to the entry of a default as to them so that the court might retain jurisdiction over them. This is rather an unique proposition. We can conceive of no circumstances under which a party, not in default, could be compelled against his will to submit to the entry of a default against him.

It has always been the rule in this state that a party, who has no interest in the subject matter of a proceeding and files a disclaimer of interest therein, may be properly dismissed from such proceeding. Neither in his briefs nor on the oral argument of this case has plaintiff's attorney pointed out any sound reason for deviating from said rule. By reason of their disclaimer Bruce Tidholm and Lois Ewing will be bound by the final determination of this cause to

"These defendants disclaim all right, title and interest in and to said estate and in and to the proceeds last will of August Tidholm, deceased, in the said complaint mentioned and every part thereof; and pray to be dismissed with their reasonable costs and charges in this behalf wrongfully sustained.

Bruce Tidholm
Lois Ewing"

In response to the motion of said Bruce Tidholm and Lois Ewing the following order was entered:

"And it appearing that defendants Bruce Tidholm and Lois Ewing have filed a disclaimer of any interest in the subject matter of this suit, IT IS ORDERED, that said cause be dismissed as to them."

Being heirs at law, Bruce Tidholm and Lois Ewing were necessary parties to this proceeding under the Administration of Estates Act. (Geo. 91, par. 243, chap. 3, Ill. Rev. Stat. 1941.) While it was the duty of plaintiff to make them parties to this suit, there is no reason why they should be compelled to remain in this case as defendants and be subjected to the expense of following this litigation to its conclusion when they disclaim any interest in the subject matter thereof. Plaintiff suggests that, if they want to avoid the expense of defending the suit, they should be compelled to submit to the entry of a default as to them so that the court might retain jurisdiction over them. This is rather an unique proposition. We can conceive of no circumstances under which a party, not in default, could be compelled against his will to submit to the entry of a default against him.

It has always been the rule in this state that a party, who has no interest in the subject matter of a proceeding and files a disclaimer of interest therein, may be properly dismissed from such proceeding. Neither in his briefs nor on the oral argument of this case has plaintiff's attorney pointed out any sound reason for deviating from said rule. By reason of their disclaimer Bruce Tidholm and Lois Ewing will be bound by the final determination of this cause to

the same extent as if it had not been dismissed as to them.

Other points have been urged and considered but in the view we take of this case we deem it unnecessary to discuss them.

The order of the Circuit court of Cook county should be and it is affirmed.

ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

the same extent as if it had not been discussed as to them.

Other points have been urged and considered but in the view we take of this case we deem it unnecessary to discuss them.

The order of the Circuit court of Cook-county should be and it is affirmed.

CLARK, APPELLEE.

Friend, P. J., and Scanlan, J., concur.

42295

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| H. C. PHILLIPS,<br>Plaintiff below,<br><br>v.<br><br>JULIUS F. SMIETANKA, Trustee, et al.,<br>Defendants below.<br><br>H. A. WILLIAMS and SEWELL & SONS., Inc.,<br>Appellees,<br><br>GEORGE W. LAWRENCE and PAULINE J. LAWRENCE,<br>Appellants. | APPEAL FROM<br>MUNICIPAL COURT<br>OF CHICAGO. |

405/27

322 I.A. 692

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was originally brought by H. C. Phillips as plaintiff against Julius F. Smietanka, trustee, H. A. Williams, Union State Investment Co., George W. Lawrence, Pauline J. Lawrence and Sewell & Sons, Inc., as defendants, to recover a commission of $225 which he alleged he had earned for making a loan of $2,000 to the defendant, George W. Lawrence. Defendants George W. Lawrence and Pauline J. Lawrence, his wife, filed a counterclaim against the defendants, H. A. Williams and Sewell & Sons, Inc. (hereinafter for convenience sometimes referred to as the Sewell Company), predicated upon the alleged wrongful conduct and breach of contract of Williams and the Sewell Company. Defendant Sewell Company filed a counterclaim against defendants George W. Lawrence and Pauline J. Lawrence to recover a commission of $225 on a loan of $2,500 which it was alleged said George W. Lawrence and Pauline J. Lawrence wrongfully refused to accept. The case was tried by the court without a jury and judgment was entered in favor of defendants and against plaintiff on the latter's statement of claim. Judgment was entered against Sewell Company on its counterclaim against George W. Lawrence

4229½

H. C. PHILLIPS,
Plaintiff below,

v.

JULIUS F. SMIETANKA, Trustee,
et al.,
Defendants below.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

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H. A. WILLIAMS and SEWELL & SONS,
Inc.,
Appellees,

GEORGE W. LAWRENCE and PAULINE J.
LAWRENCE,
Appellants.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was originally brought by H. C. Phillips as plaintiff against Julius F. Smietanka, trustee, H. A. Williams, Union State Investment Co., George W. Lawrence, Pauline J. Lawrence and Sewell & Sons, Inc., as defendants, to recover a commission of $225 which he alleged he had earned for making a loan of $2,000 to the defendant, George W. Lawrence. Defendants George W. Lawrence and Pauline J. Lawrence, his wife, filed a counterclaim against the defendants, H. A. Williams and Sewell & Sons, Inc. (hereinafter for convenience sometimes referred to as the Sewell Company), predicated upon the alleged wrongful conduct and breach of contract of Williams and the Sewell Company. Defendant Sewell Company filed a counterclaim against defendants George W. Lawrence and Pauline J. Lawrence to recover a commission of $225 on a loan of $2,500 which it was alleged said George W. Lawrence and Pauline J. Lawrence wrongfully refused to accept. The case was tried by the court without a jury and judgment was entered in favor of defendants and against plaintiff on the latter's statement of claim. Judgment was entered against Sewell Company on its counterclaim against George W. Lawrence

and Pauline J. Lawrence. Judgment was entered against George W. Lawrence and Pauline J. Lawrence on their counterclaim against the Sewell Company and Williams. George W. Lawrence and Pauline J. Lawrence (hereinafter sometimes referred to as appellants) appeal from the judgment entered against them on their counterclaim.

For a proper understanding of the questions presented it is necessary to state the facts rather fully. Julius F. Smietanka, as trustee, owned the property at 6019-21 South Parkway, Chicago, Illinois, and was desirous of selling it. The Union State Investment Co. represented him in the sale of the property. This property was listed for sale with the Sewell Company, which was engaged in the real estate brokerage business. H. A. Williams was licensed as a real estate salesman but not as a real estate broker. In the transaction involved herein Williams acted as the agent of the Sewell Company. Williams submitted the property to appellants, advising them that the sale price thereof was $18,000 and that a down payment of $6,000 would be required. Appellants stated to Williams that they wanted to purchase the property but that they only had $3,500 in cash available and would like to make a personal loan of $2,500 in order to have sufficient money for the down payment. Williams procured the Sewell Company to make the loan. The Sewell Company made the following written commitment to appellants:

"December 17, 1940

Atty. and Mrs. George W. Lawrence
424 East 46th Street
Chicago, Illinois

Dear Sir and Madam:

Please be advised that a loan in the amount of $2500.00 will be made when the contract is accepted and the deal ready to be closed.

and Pauline J. Lawrence. Judgment was entered against George W. Lawrence and Pauline J. Lawrence on their counterclaim against the Sewell Company and Williams. George W. Lawrence and Pauline J. Lawrence (hereinafter sometimes referred to as appellants) appeal from the judgment entered against them on their counterclaim.

For a proper understanding of the questions presented it is necessary to state the facts rather fully. Julius F. Smietanka, as trustee, owned the property at 6019-21 South Parkway, Chicago, Illinois, and was desirous of selling it. The Union State Investment Co. represented him in the sale of the property. This property was listed for sale with the Sewell Company, which was engaged in the real estate brokerage business. H. A. Williams was licensed as a real estate salesman but not as a real estate broker. In the transaction involved herein Williams acted as the agent of the Sewell Company. Williams submitted the property to appellants, advising them that the sale price thereof was $18,000 and that a down payment of $6,000 would be required. Appellants stated to Williams that they wanted to purchase the property but that they only had $3,500 in cash available and would like to make a personal loan of $2,500 in order to have sufficient money for the down payment. Williams procured the Sewell Company to make the loan. The Sewell Company made the following written commitment to appellants:

"December 17, 1940

Atty. and Mrs. George W. Lawrence
424 East 46th Street
Chicago, Illinois

Dear Sir and Madam:

Please be advised that a loan in the amount of $2500.00 will be made when the contract is accepted and the deal ready to be closed.

This loan is to be applied as part of the $6,000.00 down payment on the building located at 6019-21 South Parkway. The same is to be payable $50.00 per month including interest at 5%.

Yours truly,

Sewell & Sons, Inc.
A. W. Sewell
Arthur W. Sewell."

This loan was not to be secured by a mortgage on the property. The foregoing commitment was supplemented by an oral agreement that appellants would assign the rents from the property to the Sewell Company as security for the loan and that they would allow said company to manage the property. It developed just before the deal was closed consummating the sale of the property to appellants that they and the Sewell Company were not in accord as to the terms of the management agreement. Their differences concerned the duration of the management agreement and the disbursement of the rents to be collected by the Sewell company.

On January 13, 1941 a contract for the sale of the property was executed by Smietanka as seller and appellants as purchasers and at that time appellants deposited $1,000 earnest money. The contract provided that the brokers' commission of $900 for the sale of the property was to be divided equally between Union State Investment Co. and the Sewell Company. On June 2, 1941 appellants, having accumulated an additional $500 toward the purchase price of the property, applied to H. C. Phillips, the original plaintiff herein, for a loan of $2,000 to use in place of the $2,500 loan which the Sewell Company had agreed to make. On June 4, 1941 George W. Lawrence wrote the Sewell Company the following letter:

"June 4, 1941.

Sewell & Sons, Inc.,
4707 South Parkway,
Chicago, Illinois.

This loan is to be applied as part of the $6,000.00 down payment on the building located at 4707-21 South Parkway. The same is to be payable $50.00 per month including interest at 5%.

Yours truly,

Sewell & Sons, Inc.
A. J. Sewell
Arthur T. Sewell."

This loan was not to be secured by a mortgage on the property. The foregoing commitment was supplemented by an oral agreement that appellants would assign the rents from the property to the Sewell Company as security for the loan and that they would allow said company to manage the property. It developed just before the deal was closed concerning the sale of the property to appellants that they and the Sewell Company were not in accord as to the terms of the management agreement. Their differences concerned the duration of the management agreement and the disbursement of the rents to be collected by the Sewell company.

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"June 4, 1941.

Sewell & Sons, Inc.,
4707 South Parkway,
Chicago, Illinois.

Attention: Mr. Arthur W. Sewell

Dear Sir:

This is to officially notify you that the contract has been accepted for the premises 6019-21 South Parkway, and the deal is ready to be closed.

We are now ready to take advantage of your committment of December 17, 1940, which provides among other things that a 'Loan of $2225.00 will be made when the contract is accepted, and the deal is ready to be closed.'

The closing date has been set for Monday, June 9, 1941. The place of the closing can be secured from my office.

Thanks in advance for your cooperation in the premises, I am

Very truly yours,

GWL/G George W. Lawrence."

In reply thereto the Sewell Company wrote George W. Lawrence as follows:

"June 6, 1941.

Mr. George W. Lawrence, Attorney,
412 East 47th Street,
Chicago, Illinois.

Dear Sir:

Pursuant to your letter of June 4th you are hereby advised that if you will let me know the place of closing, I will be there.

Further, in submitting the management agreement, will you please see that the period covers five years; and also that there is incorporated a stipulation to the effect that we, as managing agents, will make the payments on the first mortgage.

Assuring you of our continued co-operation,

Yours truly,

Sewell & Sons, Inc.,
(Signed) Arthur W. Sewell."

George W. Lawrence responded to the Sewell Company letter of June 6, 1941 as follows:

"June 7, 1941

Sewell & Sons, Inc.
Attention, Mr. Arthur W. Sewell,
4707 South Parkway
Chicago, Illinois.

Dear Sir:

This acknowledges receipt of your letter of June 6.

Attention: Mr. Arthur W. Sewell

Dear Sir:

This is to officially notify you that the contract has been accepted for the premises 6019-21 South Parkway, and the deal is ready to be closed.

We are now ready to take advantage of your commitment of December 17, 1940, which provides among other things that a 'loan of $2222.00 will be made when the contract is accepted, and the deal is ready to be closed.'

The closing date has been set for Monday, June 9, 1941. The place of the closing can be secured from my office.

Thanks in advance for your cooperation in the premises, I am

Very truly yours,

G:L/G George W. Lawrence."

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Mr. George W. Lawrence, Attorney,
412 East 47th Street,
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Further, in submitting the management agreement, will you please see that the period covers five years; and also that there is incorporated a stipulation to the effect that we, as managing agents, will make the payments on the first mortgage.

Assuring you of our continued co-operation,

Yours truly,

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(Signed) Arthur W. Sewell."

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"June 7, 1941

Sewell & Sons, Inc.
Attention, Mr. Arthur W. Sewell,
4707 South Parkway
Chicago, Illinois.

Dear Sir:

This acknowledges receipt of your letter of June 6,

Contents carefully noted.

The managing agreement was to cover only the period during which we were indebted to you, and you were not to pay any bills except to deduct from the collections as made by your fifty dollars ($50.00) a month on account of your obligations.

Not only will we not stipulate that you are not to make the payments on the first mortgage, but we will stick to the original agreement, which was, you were to make the collections only, and no disbursements for us that was the original agreement, because if it was not, I would insist that it should be now.

Inasmuch as this matter has come up, I think it should be settled before anything else is settled.

Very truly yours,

GWL:G George W. Lawrence."

When Lawrence wrote this letter of June 7, 1941 to the Sewell Company, he had already received the loan of $2,000 from Phillips, out of which he paid the latter $100 commission for making the loan. This loan was used to close the deal on June 10, 1941.

The second amended counterclaim of George W. Lawrence and Pauline J. Lawrence, upon which they seek recovery against H. A. Williams and Sewell & Sons, Inc., charges that the Sewell Company wrongfully refused to make the $2,500 loan to appellants as agreed; that because of such refusal Williams, as agent for the Sewell Company, authorized George W. Lawrence to obtain a loan from some other source and he would be paid $225 "as commission for said loan" out of "the commission for the purchase of the property;" that Lawrence promised to pay Phillips said $225 commission if he made the $2,500 loan; that Phillips made the loan but "has not been paid the said $225 as promised out of the commission of the purchase price of the property;" that Williams and the Sewell Company conspired to defraud Lawrence out of his $1,000 earnest money by refusing to make the loan; that Williams neglected and refused to appear at the closing of the deal and neglected and refused to have the Sewell Company present at the closing of the deal with the

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Inasmuch as this matter has come up, I think it should be settled before anything else is settled.

Very truly yours,

GWL:G George W. Lawrence."

When Lawrence wrote this letter of June 7, 1941 to the Sewell Company, he had already received the loan of $2,000 from Phillips, out of which he paid the latter $100 commission for making the loan. This loan was used to close the deal on June 10, 1941.

The second amended counterclaim of George W. Lawrence and Pauline J. Lawrence, upon which they seek recovery against H. A. Williams and Sewell & Sons, Inc., charges that the Sewell Company wrongfully refused to make the $2,500 loan to appellants as agreed; that because of such refusal Williams, as agent for the Sewell Company, authorized George W. Lawrence to obtain a loan from some other source and he would be paid $225 "as commission for said loan" out of "the commission for the purchase of the property;" that Lawrence promised to pay Phillips said $225 commission if he made the $2,500 loan; that Phillips made the loan but "has not been paid the said $225 as promised out of the commission of the purchase price of the property;" that Williams and the Sewell Company conspired to defraud Lawrence out of his $1,000 earnest money by refusing to make the loan; that Williams neglected and refused to appear at the closing of the deal and neglected and refused to have the Sewell Company present at the closing of the deal with the

$2,500, which it had agreed to loan to appellants, and that such "neglect and refusal" on the part of Williams "was for the purpose of causing" appellants to "incur additional expenses" and to "lose their earnest money;" that appellants are "now being sued" by Phillips, the original plaintiff herein, for his services in procuring the $2,000 loan "at the request of Lawrence and Williams;" that because of the failure, neglect and refusal of the Sewell Company and Williams "to perform their said contract," appellants have been compelled to incur additional expenses in defending against the claim of Phillips in the instant proceeding; and that appellants have "been put to a great deal of expense by the nonperformance of the contract of Sewell & Sons, Inc."

The allegations of appellants' counterclaim as to the alleged damages suffered by them and as to how and by whom they were caused are extremely confusing. It is difficult to understand how they could advance such claims as are embraced in their counterclaim unless they had forgotten the letter written by George W. Lawrence to the Sewell Company on June 4, 1941 and the reply thereto of said company on June 6, 1941.

All of appellants' charges against the counter-defendants stem from the Sewell Company's commitment to loan said appellants $2,500 to be applied on the down payment on the purchase price of the property. The Sewell Company agreed to make the loan at the time the deal was closed. It is undisputed that appellants agreed to assign the rents from the property to the Sewell Company as security for the loan and that they further agreed to allow said company to manage the property and collect the rents.

The allegations of appellants' counterclaim as to the purported promise of Williams to give appellants $225 of some unmentioned person's share of the commission for the sale of the property for the purpose of paying that amount as commission

$2,500, which it had agreed to loan to appellants, and that such "neglect and refusal" on the part of Williams "was for the purpose of causing" appellants to "incur additional expenses" and to "lose their earnest money;" that appellants are "now being sued" by Phillips, the original plaintiff herein, for his services in procuring the $2,000 loan "at the request of Lawrence and Williams;" that because of the failure, neglect and refusal of the Sewell Company and Williams "to perform their said contract," appellants have been compelled to incur additional expenses in defending against the claim of Phillips in the instant proceeding; and that appellants have "been put to a great deal of expense by the nonperformance of the contract of Sewell & Sons, Inc."

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The allegations of appellants' counterclaim as to the purported promise of Williams to give appellants $225 of some unmentioned person's share of the commission for the sale of the property for the purpose of paying that amount as commission

for a loan in lieu of the Sewell Company's loan and as to the Sewell Company's purported wrongful failure to perform its agreement to make the loan have no factual basis. That Williams ever made such a promise or that the Sewell Company wrongfully failed to make the loan to appellants as agreed is conclusively refuted by the correspondence between Lawrence and the Sewell Company heretofore set forth. If appellants had been theretofore advised either by the Sewell Company or Williams that said company refused to make the loan or if Williams had theretofore made the promise attributed to him by appellants, how can the statements in Lawrence's letter of June 4, 1941 to the Sewell Company be possibly reconciled with such prior refusal of the Sewell Company to make the loan or with Williams purported prior promise? Said letter treated the Sewell Company's agreement to make the loan as alive and subsisting. Lawrence stated therein that "the deal is ready to be closed" and "We are now ready to take advantage of your commitment of December 17, 1940." There is certainly nothing said in the Lawrence letter of June 4, 1941 that imports that appellants had ever been advised by the Sewell Company, Williams or anybody else that the Sewell Company had previously refused to make the loan and neither is there any statement in the Sewell Company's reply of June 6, 1941 to the Lawrence letter that imports anything but a readiness and willingness to comply with its agreement to make the loan. The Sewell Company stated in said reply, "Pursuant to your letter of June 4th you are hereby advised that if you will let me know the place of closing, I will be there." The Lawrence letter of June 4, 1941 and the Sewell Company's reply thereto refute every charge in appellants' counterclaim of wrongful conduct or breach of contract by either the Sewell Company or Williams.

Furthermore we think that the Lawrence letter of June 4, 1941 was a pretense and mere camouflage to veil appellants'

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Furthermore we think that the Lawrence letter of June 4, 1941 was a pretense and mere camouflage to vail appellants'

real purpose. At the time Lawrence wrote that letter appellants did not want the Sewell Company's loan for which they would have had to pay a commission of $225. They had found a cheaper loan elsewhere for which they only had to pay a commission of $100. They had made application for this cheaper loan on June 2, 1941, two days before Lawrence wrote the Sewell Company, "We are now ready to take advantage of your commitment of December 17, 1940." Appellants received the money on the Phillips loan on June 7, 1941, the very day Lawrence wrote the Sewell Company that appellants couldn't agree with the latter's suggestions as to the terms of the property management agreement. So it appears that the Sewell Company's loan was not made because of the unwillingness of said company to make it but because appellants did not want it. The Sewell Company's loan was rejected by appellants ostensibly because they could not agree with said company on the terms of the management agreement but actually because they no longer wanted or needed it.

Since there is not even the slightest merit in this appeal, the judgment entered by the Municipal court of Chicago against George W. Lawrence and Pauline J. Lawrence on their counterclaim is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

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Since there is not even the slightest merit in this appeal, the judgment entered by the municipal court of Chicago against George W. Lawrence and Pauline J. Lawrence on their counterclaim is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

42571

HERLIHY MID-CONTINENT COMPANY,
a corporation,
Appellant,

v.

THE SANITARY DISTRICT OF CHICAGO,
a Municipal corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

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322 I.A. 692

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Herlihy Mid-Continent Company, against defendant, Sanitary District of Chicago, to recover damages alleged to have been caused by defendant in connection with a construction contract. The case was tried by the court without a jury and judgment was entered in favor of plaintiff and against defendant for $720.84. Plaintiff appeals. No question is raised on the pleadings.

On September 10, 1931, the Herlihy Mid-Continent Company entered into a contract with the Sanitary District of Chicago, under the terms of which plaintiff agreed to construct Division D of the Calumet Sewage Treatment Works Extension. Division D consisted of twenty-two aeration tanks, sixteen final settling tanks and an operating gallery with its superstructure, the building of which involved excavation, concrete work, pipe and valve work, miscellaneous metal work, masonry and furnishing and installing mechanical, electrical and hydraulic equipment and other appurtenances.

Plaintiff began work under its contract September 24, 1931. It proceeded therewith without interruption until December 24, 1931, when all work was suspended because of defendant's inability to pay the installments due for work done in October, November and December, 1931. The contract required defendant to pay plaintiff monthly 87-1/2% of the amount due for work done and materials furnished during the

MONTGOMERY WARD-CONTINENTAL COMPANY,
a corporation,
appellant,

v.

THE MONTGOMERY DISTRICT OF CHICAGO,
a municipal corporation,
appellee.

IN. DISTRICT COURT OF APPEALS FOR THE SECOND DISTRICT.

This action was brought by plaintiff, Montgomery Ward-Continent Company, against defendant, Montgomery District of Chicago, to recover damages alleged to have been caused by defendant in connection with a construction contract. The case was tried by the court without a jury and judgment was entered in favor of plaintiff and against defendant for $20,[illegible]. Defendant appeals. The question is raised on the pleadings.

On September 10, 1921, the Montgomery Ward-Continent Company entered into a contract with the Montgomery District of Chicago, under the terms of which plaintiff agreed to construct Division D of the Calumet Sewage Treatment Works Extension. Division D consisted of twenty-two sedimentation tanks, sixteen final settling tanks and an operating gallery with its superstructure, the building of which involved excavation, concrete work, pipe and valve work, miscellaneous metal work, masonry and furnishing and installing mechanical, electrical and hydraulic equipment and other appurtenances.

Plaintiff began work under its contract September 24, 1921. It proceeded therewith without interruption until December 24, 1921, when all work was suspended because of defendant's inability to pay the installments due for work done in October, November and December, 1921. The contract required defendant to pay plaintiff monthly 97-1/2% of the amount due for work done and materials furnished during the

preceding month as evidenced by estimate vouchers prepared by defendant's Chief Engineer (hereinafter for convenience sometimes referred to as Engineer), the balance of 12-1/2% being retained as a guaranty of performance. When the work was suspended, there was due plaintiff $107,646.42 according to the progress estimate vouchers of defendant's Engineer. This amount was paid to plaintiff December 29, 1932. No work was performed under the contract from December 24, 1931 to December 26, 1933. In December 1933 defendant borrowed sufficient money from the Federal Government to enable it to complete its program for the construction of sewage treatment plants and intercepting sewers. On December 21, 1933 the parties entered into a supplemental agreement under the terms of which plaintiff agreed to resume work forthwith and complete the construction work specified in the original contract as modified by said supplemental agreement. The supplemental agreement did not alter or reduce the quantity or change the character of the work required to be done under the original contract. After the work was resumed on December 26, 1933, defendant ordered certain revisions in the structures which plaintiff had contracted to build. These revisions eliminated more than $245,000 of the work provided for in the contract, which was awarded to plaintiff on its bid of $2,182,796.65. The project was substantially completed on July 16, 1936 and accepted by the Sanitary District on November 24, 1936, when plaintiff was paid the amount shown to be due by the final estimate of defendant's Chief Engineer, including all amounts retained as a guaranty of performance. When the Board of Trustees of the Sanitary District authorized the revisions in the work, it directed that payments made to plaintiff under its contract were "subject to later determination of debits and credits."

preceding month as evidenced by estimate vouchers prepared by defendant's Chief Engineer (hereinafter for convenience sometimes referred to as Engineer), the balance of 15-1/2% being retained as a guaranty of performance. When the work was suspended, there was due plaintiff $47,646.42 according to the progress estimate vouchers of defendant's Engineer. This amount was paid to plaintiff December 19, 1932. No work was performed under the contract from December 24, 1931 to December 26, 1933. In December 1933 defendant borrowed sufficient money from the Federal Government to enable it to complete its program for the construction of sewage treatment plants and interceptting sewers. On December 21, 1933 the parties entered into a supplemental agreement under the terms of which plaintiff agreed to resume work forthwith and complete the construction work specified in the original contract as modified by said supplemental agreement. The supplemental agreement did not alter or reduce the quantity or change the character of the work required to be done under the original contract. After the work was resumed on December 26, 1933, defendant ordered certain revisions in the structures which plaintiff had contracted to build. Those revisions eliminated more than $245,000 of the work provided for in the contract, which was awarded to plaintiff on its bid of $2,182,796.67. The project was substantially completed on July 16, 1936 and accepted by the Sanitary District on November 4, 1936, when plaintiff was paid the amount shown to be due by the final estimate of defendant's Chief Engineer, including all amounts retained as a guaranty of performance. When the Board of Trustees of the Sanitary District authorized the revisions in the work, it directed that payments made to plaintiff under the contract were "subject to later determination of debits and credits."

Plaintiff's amended complaint and the amendment thereto asserted claims as follows:

(1) For damages for delay sustained by plaintiff during the period work was suspended through the fault of the defendant - from December 24, 1931 to December 26, 1933.

(2) For loss of profit, overhead, fixed charges and indirect expense sustained by plaintiff as a result of the elimination by defendant of a substantial part of the work required to be done under the original contract.

Defendant disclaimed liability under Article 30 of the contract for plaintiff's damages resulting from the delay caused by the failure of the Sanitary District to comply with the terms of the contract. It disclaimed liability under Article 6 of the contract for the loss and damages alleged to have been sustained by plaintiff by reason of the revisions made in the plans by the Sanitary District.

It was stipulated upon the trial that plaintiff's damages caused by the suspension of the work, in the event that defendant is held liable therefor, are as follows:

| | | |
|---|---|---|
| (a) | Office Overhead | $ 27,500.00 |
| (b) | Equipment rental | |
| | (1) Equipment on site | 27,049.38 |
| | (2) Equipment not on site | 26,462.30 |
| | (3) Equipment of sub-contractor T. M. White | 15,125.22 |
| (c) | Increased cost of materials | |
| | (1) Actually paid | 34,838.90 |
| | (2) Not paid by plaintiff | 97,364.19 |
| | | $228,339.99 |

Article 30 of the contract, including its heading, reads as follows:

"Unavoidable Delays.

"Article 30. Should the Contractor be obstructed or delayed in the commencement, prosecution or completion of the work hereunder by anyact or delay of the Sanitary District or public utility company whose services are required in the prosecution of work under this contract, or by unavoidable acts or delays on the part of transportation companies in

Plaintiff's amended complaint and the amendment thereto asserted claims as follows:

(1) For damages for delay sustained by plaintiff during the period work was suspended through the fault of the defendant - from December 4, 1921 to December 6, 1922.

(2) For loss of profit, overhead, other charges and indirect expenses sustained by plaintiff as a result of the obstruction by defendant of a substantial part of the work required to be done under the original contract.

Defendant disclaimed liability under Article 30 of the contract for plaintiff's damages resulting from the delay caused by the failure of the sanitary district to comply with the terms of the contract. It disclaimed liability under Article 6 of the contract for the loss and damages alleged to have been sustained by plaintiff by reason of the variations made in the plans by the sanitary district.

It was stipulated upon the trial that plaintiff's damages caused by the suspension of the work, in the event that defendant is held liable therefor, are as follows:

(a) Office Overhead..... $ 27,700.00

(b) Equipment rental

(1) Equipment on site..... $7,049.38
(2) Equipment not on site..... 4,404.30
(3) Equipment of sub-contractor
F. J. White..... 15,125.22

(c) Increased cost of material

(1) Actually paid..... $34,038.90
(2) Not paid by plaintiff..... 32,204.19

$143,522.99

Article 30 of the contract, including its heading, reads as follows:

"Unavoidable Delays.

"Article 30. Should the Contractor be obstructed or delayed in the commencement, prosecution or completion of the work hereunder by any act or delay of the sanitary district or public utility company whose services are required in the prosecution of work under this contract, or by unavoidable acts or delays on the part of transportation companies in

transporting, switching or delivering material for said work, or by acts of public authorities, or by riot, insurrection, war, pestilence, fire, lightning, earthquate, cyclone or through any delays or defaults of other parties under contract with said Sanitary District or due to unavoidable delays in obtaining the specified materials or equipment for said work, or due to strikes, or to delays which result in performing work under abnormal weather conditions beyond such as usually occur during the times specified herein, or to other causes, which causes or delays mentioned in this article (Article 30) hereof, the Engineer shall determine to be entirely beyond the control of the Contractor, then the times herein fixed for the completion of said work to the extent specified shall be extended for a period equivalent to the time lost by reason of any of the aforesaid causes mentioned in this article (Article 30). No such allowance of time shall be made, however, unless notice in writing of a claim therefor is presented to the Engineer before the thirtieth of each succeeding month of all delays occurring within the preceding month, and the Contractor shall satisfy the Engineer that the delays so claimed are unavoidable and substantial, and could not be reasonably anticipated or adequately guarded against.

"It is further expressly understood and agreed that the Contractor shall not be entitled to any damages or compensation from the Sanitary District on account of any delay or delays resulting from any of the causes aforesaid in this article (Article 30), except compensation for extra premiums paid by the Contractor on his bond and for wages and salaries of employees and other extra expense of the Contractor that is necessary only for the proper maintenance of the work and of the plant and equipment of the Contractor during or on account only of a delay or delays caused by the Sanitary District, or other contractors for said Sanitary District, or by public authorities as aforesaid. The Engineer shall determine the number of days, if any, that the Contractor has been so delayed and the amount of such extra costs to the Contractor due to said delay or delays and the amount of extra compensation to be paid to the Contractor therefor, and his decision shall be final and binding upon both parties to this contract."

The provisions of the foregoing article are identical with the provisions of Article 30 of the contract construed by this court in Ryan Company v. Sanitary District of Chicago, 317 Ill. App. 549, except that Article 30 of the present contract permitted the recovery by plaintiff of its maintenance and rehabilitation costs chargeable to the suspension of the work and these costs have been paid. In the Ryan case we held that by reason of the provisions of Article 30 of the contract involved therein the Sanitary District was absolved from liability for damages sustained by the contractor as a result of the suspension of the work, even though the work

transporting, watering or delivering material for said work, or by acts of public authorities, or by riots, insurrection, war, pestilence, fire, lightning, earthquake, cyclone or through any delays or defaults of other parties under contract with said sanitary district or due to unavoidable delays in obtaining the specified materials or equipment for said work, or due to strikes, or to delays which result in performing work under abnormal weather conditions beyond such as usually occur during the times specified herein, or to other causes, which causes or delays mentioned in this article (Article 30) hereof, the engineer shall determine to be entirely beyond the control of the contractor, then the times herein fixed for the completion of said work to the extent specified shall be extended for a period equivalent to the time lost by reason of any of the aforesaid causes mentioned in this article (Article 30). No such allowance of time shall be made, however, unless notice in writing of a claim therefor is presented to the engineer before the thirtieth of each succeeding month of all delays occurring within the preceding month, and the Contractor shall satisfy the Engineer that the delays so claimed are unavoidable and substantial, and could not be reasonably anticipated or adequately guarded against.

"It is further expressly understood and agreed that the Contractor shall not be entitled to any damages or compensation from the Sanitary District on account of any delay or delays resulting from any of the causes aforesaid in this article (Article 30), except compensation for extra premiums paid by the Contractor on his bond and for wages and salaries of employees and other extra expenses of the Contractor that is necessary only for the proper maintenance of the work and of the plant and equipment of the Contractor during or on account only of a delay or delays caused by the Sanitary District, or other contractors for said Sanitary District, or by public authorities as aforesaid. The Engineer shall determine the number of days, if any, that the Contractor has been so delayed and the amount of such extra costs to the Contractor due to said delay or delays and the amount of extra compensation to be paid to the Contractor therefor, and his decision shall be final and binding upon both parties to this contract."

The provisions of the foregoing article are identical with the provisions of Article 30 of the contract construed by this court in Ryan Company v. Sanitary District of Chicago, 319 Ill. App. 549, except that Article 30 of the present contract permitted the recovery by plaintiff of its maintenance and rehabilitation costs chargeable to the suspension of the work and these costs have been paid. In the Ryan case we held that by reason of the provisions of Article 30 of the contract involved therein the Sanitary District was absolved from liability for damages sustained by the contractor as a result of the suspension of the work, even though the work

was delayed through the fault of the Sanitary District. It is conceded that our construction of Article 30 in the Ryan case is controlling as to the construction of Article 30 of the contract involved in the instant case. Therefore it must be held that defendant is not liable for plaintiff's damages caused by the suspension of the work.

Plaintiff's theory, as stated in its brief, as to those portions of the work, which it was directed to eliminate under the revised plans, is that "defendant is liable for the loss of profit, field overhead, direct or plant charges and indirect costs on the omitted work because, when certain integral parts of the contract work were eliminated, the cost of doing the remaining work was increased in the same proportion and that plaintiff was damaged to the extent of the profit, field overhead, direct or plant charges and indirect costs allocated to the omitted work in the bid plaintiff made for doing the contract work."

Defendant's position is that "the revisions in the plans did not result in omissions of integral parts of the work, but only in changes in quantities and costs, which this court has held permissible under the provisions of Article 6 of the agreement."

As heretofore shown, plaintiff's contract for the construction of Division D of the Calumet Sewage Treatment Works Extension provided for the erection of twenty-two aeration tanks, sixteen final settling tanks and an operating gallery with its superstructure.

The following "omissions and additions" were ordered by defendant:

1. Redesign Alternate Aeration Tank Walls as Non-pressure Walls.
2. Working Stress, Reinforcing Steel, Increased from 16000 to 18000 # /Sq. In.

was delayed through the fault of the Railway Market. It is conceded that our construction of article 30 in the Lyon case is controlling as to the construction of article 30 of the contract involved in the instant case. Therefore it must be held that defendant is not liable for plaintiff's damages caused by the suspension of the work.

Plaintiff's theory, as stated in its brief, as to those portions of the work, which it was directed to eliminate under the revised plans, is that "defendant is liable for the loss of profit, field overhead, direct or plant charges and indirect costs on the omitted work because, from outside integral parts of the contract work were eliminated, the cost of doing the remaining work was increased in the same proportion and that plaintiff was damaged to the extent of the profit, field overhead, direct or plant charges and indirect costs allocated to the omitted work in the bid plaintiff made for doing the contract work."

Defendant's position is that "the revisions in the plans did not result in omissions of integral parts of the work, but only in changes in quantities and costs, which this court has held permissible under the provisions of article 6 of the agreement."

As heretofore shown, plaintiff's contract for the construction of Alvidson & of the Chinook Dam Treatment Works Extension provided for the erection of twenty-two concretion tanks, sixteen final settling tanks and an operating gallery with its appurtenances.

The following "omissions and additions" were ordered by defendant:

1. Made alternate concretion tank walls as non-pressure walls.
2. Omitted stress, reinforcing steel, increased from 16000 to 16000 # /sq. in.

3A. Reduce Width and Height of Operating Gallery
B. Reduce Unit Price Items of Operating Gallery
C. Omit Traveling Crane
D. Omit Heating and Ventilating System
E. Omit Electrical Work
4. Reduce size of Portion of Main Drain
5. Omit Diffuser Plates, Container Plates, Piping in Portion of Sludge Return On.
6. Omit 24" Gate Valves on 22-30 inch Sewage Meters
7. Omit Transmitters on 2-42 inch Air Mains
8. Remodel one Aeration Tank for Sludge Reaeration
9A. Install Precast Concrete Slabs for Top of Aeration Tank Trough
B. Omit Gravel Fill, Tile Drain in Trough
10. Substitute Copper Streamline Pipe for C. Ni. Iron Pipe — Sett. Tanks.
11A. Omit Venturi Meters on Sludge Return Lines
B. Omit Gate Valves on Sludge Return Lines 16"
Add Telescopic Weirs " " "
12. Add Lighting at Sludge Drawoff; Add Connections for Mercury Gauges
13. Change one Additional Tank for use as Re-Aeration
14. Reduce Rows of Diffuser Plate Containers from 3 to 2
15. Omit Sewage Samplers
16. Omit wall between Aeration Tanks 21 and 22
17. Installing and Removing Temporary Heating System
18. Omission of Refill and Embankment west of Pump and Blower Bldg
19. Omit Final Settling Tank No. 16
20. Omit Sludge Removal Mechanism, Tank N 16

The foregoing changes resulted in a reduction of $246,143.95 in the contract price for the work and also resulted in extra work amounting to $26,997.60. Plaintiff's claims in respect to items 3A, 3C, 3D, 3E and 20 have been settled and paid and are not involved herein.

It should be noted that the settling tanks, one of which was omitted under the revised plans, were 95 feet in diameter and were built of concrete and reinforcing steel. The wall which was omitted between two of the rectangular aeration tanks was 425 feet long. The operating gallery superstructure was reduced from two stories to one. The changes resulted in a reduction of 1,491,790 pounds in the amount of reinforcing steel used on the project and of approximately 3900 cubic yards of the different grades of concrete specified in the contract.

The question presented is whether the changes in construction, which defendant directed plaintiff to make, were merely changes in plans which defendant had the right to make under

3A. Reduce Unit Price of operating Gallery
B. Reduce Unit Price Items of operating Gallery
C. Omit Traveling Crane
D. Omit Heating and Ventil. Sys. System
E. Omit Electrical Work
4. Reduce size of portion of Tank Trash
5. Omit Filter Plates, Combiner Plates, Piping in Portion of Sludge Return Gs.
6. Omit 24" Gate Valves on 22-3/4 inch Sewage Meters
7. Omit Permanents on 2-42 inch Air Mains
8. Revised one portion Tank for Sludge Reservation
9A. Install Precast Concrete Slabs for Top of Aeration Tank Through
B. Omit Gravel Fill, Tile Drain in Trough
10. Substitute Copper Strainline Pipe for C. M.
Iron Pipe — Fett. Lines.
11A. Omit Venturi Meters on Sludge Return Lines
B. Omit Gate Valves on Sludge Return Lines 16"
Add Telescopic Weirs " " " "
12. Add Lighting at Sludge Removal; Add Connections for Recovery Gauges
13. Change one Additional Tank for use as Re-aeration
14. Reduce Flows of Filter Plate Containers from 3 to 2
15. Omit Sewage Samplers
16. Omit Wall between Aeration Tanks 21 and 22
17. Installing and Removing Temporary Heating System
18. Omission of Refill and Embankment West of Pump and Blower Bldg
19. Omit Final Settling Tank No. 16
20. Omit Sludge Removal Mechanism, Tank N 16

The foregoing changes resulted in a reduction of $246,143.75 in the contract price for the work and also resulted in extra work amounting to $26,997.60. Plaintiff's claims in respect to items 3A, 3C, 3D, 3E and 20 have been settled and paid and are not involved herein.

It should be noted that the settling tanks, one of which was omitted under the revised plans, were 95 feet in diameter and were built of concrete and reinforcing steel. The wall which was omitted between two of the rectangular aeration tanks was 427 feet long. The operating gallery superstructure was reduced from two stories to one. The changes resulted in a reduction of 1,491,790 pounds in the amount of reinforcing steel used on the project and of approximately 3000 cubic yards of the different grades of concrete specified in the contract.

The question presented is whether the changes in construction, which defendant directed plaintiff to make, were merely changes in plans which defendant had the right to make under

Article 6 of the contract without incurring liability therefor or whether they amounted to omissions of integral parts of the work.

In Ryan Co. v. Sanitary District, supra, we had occasion to construe Article 6 of a contract which is identical with Article 6 of the present contract. There the Sanitary District eliminated from its construction contract a branch sewer 1180 feet long. The omitted work effected a reduction of $81,680 in the contract price. In that case we said at p. 580:

> "If Article 6 gives defendant the right to eliminate from the contract the building of the sewer in question without compensation to plaintiff, why was it necessary to include Item (3) in the contract? When Article 6 is interpreted in the light of Item (3) it seems plain that defendant's instant contention cannot be sustained. But in our judgment Article 6 of the contract did not authorize defendant to take away from plaintiff the right to build the branch sewer. It did confer upon defendant the right to change or modify the plans of the work and the materials and quantities that might be used in its construction 'provided that if alterations are made, the general character of the work as a whole is not changed thereby.' The courts recognize and enforce the distinction between the right to change plans and the right to omit integral parts of the work. That the building of the sewer in question was an integral part of the work to be performed by plaintiff cannot be reasonably disputed."

Both parties assert that our decision in the Ryan case, in so far as it pertains to the interpretation of Article 6 of the contract, supports their respective positions, the Sanitary District contending that the revisions ordered in this case resulted only in changes in quantities and costs, which were permissible under Article 6 of the contract, and plaintiff contending that the revisions resulted in the omission of material, substantial and integral parts of the work.

It is conceded that, when the revisions were ordered, Philip Harrington, the then Chief Engineer of the Sanitary District, determined that such revisions did omit material and integral parts of the work for which plaintiff should be compensated. This was his interpretation of Article 6 of

Article 6 of the contract without incurring liability thereto or whether they assented to omissions of integral parts of the work.

In Lynn Co. v. Hunterdon District, supra, we had occasion to construe article 6 of a contract which is identical with Article 6 of the present contract. There the Hunterdon District eliminated from its construction contract a bridge approximately 1100 feet long. The omitted work effected a reduction of $40,000 in the contract price. In that case we said at p. 580:

> "If Article 6 gives defendant the right to eliminate from the contract the building of the bridge in question without compensation to plaintiff, why was it necessary to include Item (j) in the contract? Item (j) reads 6 is interpreted in the light of Item (j) it seems plain that defendant's intent concerning [illegible] is manifested. But in our judgment Article 6 of the contract did not authorize defendant to take away from plaintiff the right to build the bridge. It did confer upon defendant the right to change or modify the plans of the work and the materials and quantities that might be used in the construction 'provided that if alterations are made, the general character of the work as a whole is not changed thereby.' The courts recognize and enforce the distinction between the right to change plans and the right to omit integral parts of the work, that the utility of the owner in question was an integral part of the work to be performed by plaintiff cannot be reasonably disputed."

Both parties assert that our decision in the Lynn case, in so far as it pertains to the interpretation of Article 6 of the contract, supports their respective positions, the Hunterdon District contending that the revisions ordered in this case resulted only in changes in practice and details, which were permissible under Article 6 of the contract, and plaintiff contending that the revisions resulted in the omission of material, substantial and integral parts of the work.

It is conceded that, when the revisions were ordered, Philip Harrington, the then Chief Engineer of the Sanitary District, determined that such revisions did omit material and integral parts of the work for which plaintiff should be compensated. This was his interpretation of Article 6 of

the contract as to the work eliminated by the revisions. But defendant now insists that Harrington had no authority to bind it by his interpretation of the legal effect of Article 6, that the trial court erred in admitting in evidence his interpretation of said article and that his interpretation of the legal effect of Article 6 was no more admissible in evidence than expert opinion evidence as to the meaning of the language "change in character of the work as a whole" as it appears in Article 6, which opinion evidence was held inadmissible in the Ryan case. Harrington's interpretation of Article 6 must be viewed in an entirely different light than the opinion evidence of experts as to the meaning of the aforementioned language as used in said article. As Chief Engineer of the Sanitary District he was charged by the contract itself with the sole responsibility for its performance in accordance with its terms and he was expressly authorized therein to interpret and determine the meaning and effect of not only Article 6 but of every other provision of the contract. As to the responsibility and authority of the Chief Engineer of the Sanitary District, the contract provides:

> "The work shall be executed under the direction and supervision of the Chief Engineer of the Sanitary District and his properly authorized agents, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined. ***
>
> "To prevent all disputes and litigation, it is further agreed by and between the said Sanitary District and the Contractor that said Engineer shall determine all questions in relation to said work, and he shall in all cases decide all questions which may arise relative to the execution of the work under this contract on the part of the said Contractor, and his decision shall be final and conclusive on both parties hereto; and such decision, in case any question may arise, shall be a condition precedent to the right of said Contractor to receive any money or compensation for anything done or furnished under this contract."

It will be noted that the contract provides that the decision of the Chief Engineer as to "all questions which may arise relative to the execution of the work under this contract

the contract as to the work affected by the variation, but defendant now insists that Paragraph 5 had no authority to bind it by his interpretation of the legal effect of Article 6, that the trial court erred in admitting to evidence his interpretation of said Article and that his interpretation of the legal effect of Article 6 was so more admissible in evidence than expert opinion evidence as to the meaning of the language "change in character of the work as a whole" as it appears in Article 6, which opinion evidence was held inadmissible in the Ryan case. Darlington's interpretation of Article 6 must be viewed in an entirely different light than the opinion evidence of experts as to the meaning of the aforementioned language as used in said Article. As Chief Engineer of the Sanitary District he was charged by the contract itself with the sole responsibility for its performance in accordance with its terms and he was expressly authorized thereby to interpret and determine the meaning and effect of not only Article 6 but of every other provision of the contract. In to the responsibility and authority of the Chief Engineer of the Sanitary District, the contract provides:

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It will be noted that the contract provides that the decision of the Chief Engineer as to "all questions which may arise relative to the execution of the work under this contract

*** shall be final and conclusive on both parties." Plaintiff consented to do the work in conformity with the revised plans because under Harrington's interpretation of Article 6, the revisions resulted in omissions of integral parts of the work, for which the Chief Engineer of the Sanitary District determined that plaintiff should be compensated. Since the parties to the contract made the determination of said Chief Engineer final and binding, we have no right to consider it otherwise.

Even though the interpretation of Article 6 by the Chief Engineer were to be disregarded, it cannot be reasonably disputed that the changes in construction heretofore shown constituted in some instances material and substantial reductions in integral parts of the work and in other instances omissions of integral parts of the work. According to Harrington these changes in construction were not necessary but were made solely for the purpose of economizing on the job. In our opinion Article 6 of the contract did not authorize defendant to take away from plaintiff the right to build those integral portions of the project that were omitted or substantially reduced.

Plaintiff having been deprived of its right to perform substantial and integral portions of its contract work, what damages is it entitled to recover? The damages claimed by plaintiff consist of its anticipated profit on the omitted work plus the amount of its direct or plant charges, indirect expenses and field overhead allocated to such omitted work by plaintiff in its bid. In other words it is the profit lost by plaintiff on the whole job as the result of the material changes in the contract work which Chief Engineer Harrington determined had effected a change in "the general character of the work as a whole."

If it is held that plaintiff is entitled to recover its loss of profit on the omitted work and in addition thereto its direct or plant charges, indirect expenses and field

shall be final and conclusive on both parties." Plaintiff consented to do the work in conformity with the revised plans because under Herrington's interpretation of Article 6, the revisions resulted in omissions of integral parts of the work, for which the Chief Engineer of the Sanitary District determined that plaintiff should be compensated. Since the parties to the contract made the determination of said Chief Engineer final and binding, we have no right to construe it otherwise.

Even though the interpretation of Article 6 by the Chief Engineer were to be disregarded, it cannot be reasonably disputed that the changes in construction heretofore shown constituted in some instances material and substantial reductions in integral parts of the work and in other instances omissions of integral parts of the work. According to Herrington these changes in construction were not necessary but were made solely for the purpose of economizing on the job. In our opinion Article 6 of the contract did not authorize defendant to take away from plaintiff the right to build those integral portions of the project that were omitted or substantially reduced.

Plaintiff having been deprived of its right to perform substantial and integral portions of its contract work, what damages is it entitled to recover? The damages claimed by plaintiff consist of its anticipated profit on the omitted work plus the amount of its direct or plant charges, indirect expenses and field overhead allocated to such omitted work by plaintiff in its bid. In other words it is the profit lost by plaintiff on the whole job as the result of the material changes in the contract work which Chief Engineer Herrington determined had effected a change in "the general character of the work as a whole."

It is held that plaintiff is entitled to recover its loss of profit on the omitted work and in addition thereto its direct or plant charges, indirect expenses and field

overhead allocated to such work in its bid for performing the contract work as a whole, there is no dispute as to the amount of damages sustained by plaintiff because of the omitted work, except as to one item. This item concerns the building by plaintiff of the "effluent conduit extension."

Plaintiff contends that "the effluent conduit extension was built under a new and later and different contract" and that "the work and quantities of this separate and independent contract cannot be applied as an offset against the quantities omitted under the original contract." We do not think plaintiff's position in respect to the effluent conduit extension is sound. The contract included the building of an effluent conduit and the effluent conduit in question was merely an extension of that provided for in the original contract. The Chief Engineer requested authority from the Board of Trustees of the Sanitary District to order plaintiff to build the effluent conduit extension as an "extra" and he was granted such authority by said board. This extension was built at the same time the other work under the contract was being performed and with the same equipment, the same labor, overhead, indirect and fixed charges. We are impelled to conclude that the building of the effluent conduit extension was extra work under the original contract and was so treated by the parties. It absorbed to the extent of such extra work plaintiff's field overhead, direct or plant charges and indirect expenses just as such items would have been absorbed if omitted work to the same extent had been done. Defendant was therefore entitled to an offset of $6,911.19 by reason of plaintiff having been given the additional or extra work of building the effluent conduit extension. In our opinion plaintiff is entitled to recover damages of $49,238.51 because of the omitted work after allowing defendant said offset.

Other points have been urged and considered but in the

overhead allocated to each work in its bid for performing the contract work as a whole, there is no dispute as to the amount of damages sustained by plaintiff because of the omitted work, except as to one item. This item concerns the building by plaintiff of the "effluent conduit extension."

Plaintiff contends that "the effluent conduit extension was built under a new and later and different contract" and that "the work and quantities of this separate and independent contract cannot be applied as an offset against the quantities omitted under the original contract." We do not think plaintiff's position in respect to the effluent conduit extension is sound. The contract included the building of an effluent conduit and the effluent conduit in question was merely an extension of that provided for in the original contract.

The Chief Engineer requested authority from the Board of Trustees of the Sanitary District to order plaintiff to build the effluent conduit extension as an "extra" and he was granted such authority by said board. This extension was built at the same time the other work under the contract was being performed and with the same equipment, the same labor, overhead, indirect and fixed charges. We are impelled to conclude that the building of the effluent conduit extension was extra work under the original contract and was so treated by the parties. It absorbed to the extent of such extra work plaintiff's field overhead, direct or plant charges and indirect expenses just as such items would have been absorbed if omitted work to the same extent had been done. Defendant was therefore entitled to an offset of $6,911.49 by reason of plaintiff having been given the additional or extra work of building the effluent conduit extension. In our opinion plaintiff is entitled to recover damages of $49,[illegible].31 because of the omitted work after allowing defendant said offset.

Other points have been urged and considered but in the

view we take of this case we do not deem it necessary to discuss them.

For the reasons stated herein the judgment of the Circuit court of Cook county is reversed and judgment is entered here for $49,238.51 in favor of plaintiff and against defendant.

JUDGMENT REVERSED AND
JUDGMENT HERE.

Friend, P. J., and Scanlan, J., concur.

view we take of this case we do not deem it necessary to discuss them.

For the reasons stated herein the judgment of the Circuit court of Cook county is reversed and judgment is entered here for $49,[illegible].51 in favor of plaintiff and against defendant.

JUDGMENT REVERSED AND
JUDGMENT ENTER.

Friend, P. J., and Scanlan, J., concur.

42857

CHARLES J. EKSTRAND et al.,
Appellees,

v.

N. P. SEVERIN et al.,
Appellants.

) APPEAL FROM SUPERIOR
) COURT, COOK COUNTY.

322 I.A. 693

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiffs Charles J. Ekstrand Roy H. Ekstrand, J. Leslie Ekstrand and R. G. Erickson, doing business as Ekstrand Paint & Supply Company (hereinafter for convenience sometimes referred to collectively as Ekstrand) against defendants N. P. Severin and A. N. Severin, doing business as N. P. Severin Company (hereinafter for convenience sometimes referred to collectively as Severin), Royal Indemnity Company, Globe Indemnity Company, The Fidelity & Casualty Company of New York, American Surety Company of New York, Hartford Accident and Indemnity Company, United States Fidelity and Guaranty Company and Fidelity and Deposit Company of Maryland, to recover on a statutory bond executed by Severin as principal and the other defendants as sureties, a balance for painting materials furnished by plaintiffs in connection with the construction of the Wyandotte High School, Kansas City, Kansas. The case was tried by the court without a jury and judgment was entered in debt against defendants for $1,308,000 and plaintiffs' damages were assessed at $2,203.87 and interest thereon of $661.16, making the total amount of plaintiffs' damages $2,865.03, the debt to be discharged pro tanto on the payment of said damages and costs. Defendants appeal from said judgment and assessment of damages and plaintiffs filed a cross appeal from the credit allowed defendants under the terms of the release involved herein. The death of defendant, A. N. Severin, having been suggested, the Continental Illinois National Bank & Trust Co., as executor of his estate, was substituted as

42857

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This action was brought by plaintiffs Charles J. Ekstrand Roy H. Ekstrand, J. Leslie Ekstrand and R. G. Erickson, doing business as Ekstrand Paint & Supply Company (hereinafter for convenience sometimes referred to collectively as Ekstrand) against defendants N. P. Severin and A. N. Severin, doing business as N. P. Severin Company (hereinafter for convenience sometimes referred to collectively as Severin), Royal Indemnity Company, Globe Indemnity Company, The Fidelity & Casualty Company of New York, American Surety Company of New York, Hartford Accident and Indemnity Company, United States Fidelity and Guaranty Company and Fidelity and Deposit Company of Maryland, to recover on a statutory bond executed by Severin as principal and the other defendants as sureties, a balance for painting materials furnished by plaintiffs in connection with the construction of the Lyancette High School, Kansas City, Kansas. The case was tried by the court without a jury and judgment was entered in debt against defendants for $1,308,000 and plaintiffs' damages were assessed at $2,[illegible].97 and interest thereon of $661.10, making the total amount of plaintiffs' damages $2,867.03, the debt to be discharged nro tanto on the payment of said damages and costs. Defendants appeal from said judgment and assessment of damages and plaintiffs filed a cross appeal from the credit allowed defendants under the terms of the release involved herein. The death of defendant, A. N. Severin, having been suggested, the Continental Illinois National Bank & Trust Co., as executor of his estate, was substituted as

defendant in place of said A. N. Severin.

On June 6, 1935 Severin was awarded the general contract by the Board of Education of Kansas City, Kansas, for the construction of the Wyandotte High School in said city. As such general contractor Severin executed a bond with the other defendants as sureties thereon. This was not only a performance bond given to the state of Kansas for its own use and protection but it was also given for the benefit of all persons who furnished labor or materials for the high school building project, subject only to the prior rights of the state of Kansas.

A. H. Schultz requested Severin to give him the painting work on the high school. Severin drafted a subcontract for the painting, the seventh paragraph of which is as follows:

"It is further agreed that the Subcontractor will purchase all materials required for the completion of all work included in this contract or extensions thereof from Ekstrand Paint & Supply Company of Chicago, Illinois. In consideration of this article the Subcontractor agrees to secure from the Ekstrand Paint & Supply Company, a release issued for the benefit of the Contractor by the Ekstrand Paint & Supply Company, which will waive the right of any claim for materials furnished by the Ekstrand Paint & Supply Company up to a total amount of $2,000."

At the same time Severin also prepared a form of release, which was given to Schultz for Ekstrand to sign. Ekstrand executed the release, which reads as follows:

"KNOW ALL MEN BY THESE PRESENTS, that Ekstrand Paint & Supply Company, a Corporation of Chicago, Illinois, for and in consideration of the sum of One Dollar ***, and other valuable considerations, receipt of which are hereby acknowledged, agrees to furnish and ship to A. H. Schultz, for use in the execution of a contract for the painting and finishing of the Wyandotte High School, Kansas City, Kansas, materials as required by said contract and conforming to the requirements thereof in the value of Two Thousand Dollars.

"The undersigned further agrees to and does hereby waive and release any and all claims or right of liens on the Wyandotte High School, Kansas City, Kansas, and does further release N. P. Severin Company and its Sureties and the Owner of the Wyandotte High School, Kansas City, Kansas, of all claims and demands whatsoever to the amount of Two Thousand Dollars ***, over and above the reasonable value of all materials paid for by either N. P. Severin Company or A. H. Schultz on account of labor or materials, or both, furnished, or which may be furnished by the undersigned for the said building."

defendant in place of said A. H. Severin.

On June 6, 1925 Severin was awarded the general contract by the Board of Education of Kansas City, Kansas, for the construction of the Wyandotte High School in said city. As such general contractor Severin executed a bond with the other defendants as sureties thereon. This was not only a performance bond given to the State of Kansas for its own use and protection but it was also given for the benefit of all persons who furnished labor or materials for the high school building project, subject only to the prior rights of the state of Kansas.

A. H. Komalts requested Severin to give him the painting work on the high school. Severin invited a subcontract for the painting, the seventh paragraph of which is as follows:

"It is further agreed that the subcontractor will purchase all materials required for the completion of all work included in this contract or extensions thereof from Eckstrand Paint & Supply Company of Chicago, Illinois. In consideration of this article the Subcontractor agrees to secure from the Eckstrand Paint & Supply Company a release signed for the benefit of the Contractor by the Eckstrand Paint & Supply Company, which will waive the right of any claim for materials furnished by the Eckstrand Paint & Supply Company up to a total amount of $2,000."

At the same time Severin also prepared a form of release, which was given to Komalts for Eckstrand to sign. Eckstrand executed the release, which reads as follows:

"KNOW ALL MEN BY THESE PRESENTS, that Eckstrand Paint & Supply Company, a Corporation of Chicago, Illinois, for and in consideration of the sum of One Dollar ***, and other valuable considerations, receipt of which are hereby acknowledged, agrees to furnish and ship to A. H. Komalts, for use in the execution of a contract for the painting and finishing of the Wyandotte High School, Kansas City, Kansas, materials as required by said contract and conforming to the requirements thereof in the value of Two Thousand Dollars.

"The undersigned further agrees to and does hereby waive and release any and all claims or right of liens on the Wyandotte High School, Kansas City, Kansas, and does further release H. P. Severin Company and its sureties and the Owner of the Wyandotte High School, Kansas City, Kansas, of all claims and demands whatsoever to the amount of Two Thousand Dollars ***, over and above the reasonable value of all materials paid for by either H. P. Severin Company or A. H. Komalts on account of labor or materials, or both, furnished, or which may be furnished by the undersigned for the said building."

Schultz returned the Ekstrand release to Severin and he was awarded the subcontract for the painting, which obligated him to purchase all the painting materials for the job from Ekstrand. The contract price for the painting under Schultz's subcontract was $14,950. It should be noted that the aforesaid release was signed by Ekstrand Paint & Supply Company, a corporation, and that the painting materials were to be supplied by such corporation. However, said corporation's right to supply the painting materials was assigned to plaintiffs on December 15, 1935 and they supplied the materials involved herein.

Late in 1935, when he was about to proceed with the work under his subcontract, Schultz procured a small amount of painting materials and supplies from Ekstrand, whose place of business was in Chicago. After he started work on the high school he was informed that, because of certain union restrictions, it would be necessary for him to purchase his painting materials in Kansas City and he so advised Ekstrand. Arrangements were then made by Ekstrand with three Kansas City concerns, Sherwin-Williams Co., Hunn-Letton Paint Co. and Cook Paint & Varnish Company to have them deliver the required painting materials direct to the job and to bill Ekstrand for same.

On April 7, 1937 Severin received from Schultz after the latter had completed the work under his subcontract, the following statement:

"N. P. Severin Company
222 West Adams Street
Chicago, Ill.

* * *

Job Wyandotte High School K. C. Kan

All material used on above protect
Sherwin Williams Co.....$ 546.70
Kansas City Kan.

Hunn Letton Paint Co..... 1,347.50
1518 Grand Ave K. C. Mo.

Schultz returned the Westerand release to Severin and he was awarded the subcontract for the painting, which obligated him to purchase all the painting materials for the job from Westerand. The contract price for the painting under Schultz's subcontract was $14,950. It should be noted that the aforesaid release was signed by Westerand Paint & Supply Company, a corporation, and that the painting materials were to be supplied by such corporation. However, said corporation's right to supply the painting materials was assigned to plaintiffs on December 15, 1935 and they supplied the materials involved herein.

Late in 1935, when he was about to proceed with the work under his subcontract, Schultz procured a small amount of painting materials and supplies from Westerand, whose place of business was in Chicago. After he started work on the high school he was informed that, because of certain union restrictions, it would be necessary for him to purchase his painting materials in Kansas City and he so advised Westerand. Arrangements were then made by Westerand with three Kansas City concerns, Sherwin-Williams Co., Hunn-Letton Paint Co. and Cook Paint & Varnish Company to have them deliver the required painting materials direct to the job and to bill Westerand for same.

On April 7, 1937 Severin received from Schultz after the latter had completed the work under his subcontract, the following statement:

"A. F. Severin Company
222 West Adams Street
Chicago, Ill.

* * *

Job Vandotte High School K. C. Kan

All material used on above project

Sherwin Williams Co.... ..... $46.70
Kansas City Kan.

Hunn Letton Paint Co..... 1,347.50
1518 Grand Ave K. C. Mo.

| | |
|---|---|
| Cook Paint & Varnish Co..... 1309 Grand Ave K. C. Mo. | 929.50 |
| Ekstrand Paint & Supply Co..... 5219 N. Clark - Chicago | 107.80 |
| total.....$2,931.50 | |

Signed: A. H. Schultz"

Sometime later in April or early in May Roy H. Ekstrand, A. H. Schultz and Wilson H. Eastman had a conference in the Severin office regarding the amount due Ekstrand for the painting materials furnished Schultz, Eastman was a civil engineer and had general supervision of the high school project for Severin. Ekstrand had been theretofore paid $550 on account and, according to Eastman, Severin still owed Schultz $1,050 on his subcontract. It is undisputed that during said conference Roy H. Ekstrand informed Eastman that plaintiffs had furnished Schultz directly $198.12 worth of materials and that the three Kansas City concerns sent invoices to Ekstrand for all the painting materials furnished by them to the high school project as follows: Sherwin-Williams Co. $496.95, Hunn-Letton Co. $1,213.37 and Cook Paint & Varnish Company $845.43. Eastman testified that as Roy H. Ekstrand gave him these figures he made a pencil memorandum of same, which was received in evidence. The foregoing amounts aggregated $2,753.87. Discussion then ensued as to what would be a fair profit for Ekstrand on the painting materials so furnished. According to Eastman, it was agreed between him and Roy H. Ekstrand that 15% of said $2,753.87 or $313.03 would be a fair and reasonable profit for Ekstrand and he made the notation "Profit to Eck...$313.03" on said memorandum. According to Roy H. Eckstrand, the matter of the Ekstrand profit on the painting materials was discussed but he denied that there was any such agreement. Although Schultz was present at the conference, he did not know or remember anything either about the invoice figures furnished

Cook Paint & Varnish Co. ..... 929.50
1309 Grand Ave K. C. Mo.

Eastern Paint & Supply Co. ..... 197.80
5219 N. Clark - Chicago

total.....$2,931.50

Signed: A. H. Schultz"

Sometime later in April or early in May Roy H. Eastern, A. H. Schultz and Gilson H. Eastman had a conference in the Severin office regarding the amount due Eastern for the painting materials furnished Schultz. Eastman was a civil engineer and had general supervision of the high school project for Severin. Eastern had been theretofore paid $550 on account and, according to Eastman, Severin still owed Schultz $1,050 on his subcontract. It is undisputed that during said conference Roy H. Eastern informed Eastman that plaintiffs had furnished Schultz directly $1,05.12 worth of materials and that the three Kansas City concerns sent invoices to Eastern for all the painting materials furnished by them to the high school project as follows: Sherwin-Williams Co. $496.95, Hum-Lesson Co. $1,213.37 and Cook Paint & Varnish Company $845.43. Eastman testified that as Roy H. Eastern gave him these figures he made a pencil memorandum of same, which was received in evidence. The foregoing amounts aggregated $2,753.37. Discussion then ensued as to what would be a fair profit for Eastern on the painting materials so furnished. According to Eastman, it was agreed between him and Roy H. Eastern that 15% of said $2,753.37 or $413.03 would be a fair and reasonable profit for Eastern and he made the notation "Profit to ok...$413.03" on said memorandum. According to Roy H. Eastern, the matter of the Eastern profit on the painting materials was discussed but he denied that there was any such agreement. Although Schultz was present at the conference, he did not know or remember anything either about the invoice figures furnished

Eastman by Roy H. Ekstrand or the agreement as to the Ekstrand profit, concerning which Eastman testified. Roy H. Ekstrand admitted seeing Eastman make the pencil memorandum entries but he stated that he did not see what he actually wrote on the paper. The memorandum is in part as follows:

| | |
|---|---|
| "Sherwin Wms..... | 496.95 |
| H. L..... | 1213.37 |
| Cook..... | 845.43 |
| Eck..... | 198.12 |
| | 2753.87 |
| Profit to Eck..... | 313.03 |
| Schultz Bills..... | 3066.90" |

Eastman testified that after the matter of the Ekstrand profit had been settled, the discussion turned to the release given by Ekstrand to Severin and that no agreement could be reached as to the meaning of the terms of said release. Roy H. Ekstrand testified that the discussion concerning the release became so acrimonious that the conference ended with his declaration that the construction of said release would have to be left to the courts.

Thereafter the following letter was sent by Schultz to Severin:

"Chicago, Illinois
May 13, 1937

N. P. Severin Company
222 W. Adams St.
Chicago, Illinois

Gentlemen:

Enclosed herewith find statement of the Ekstrand Paint & Supply Company, for material furnished to me, and used under my contract on the Wyandotte High School, in Kansas City, Kansas. This statement is correct, and should be paid to Ekstrand Paint & Supply Company as soon as possible. It is ready to deliver to you the releases of Hunn Letton Paint Company, The Sherwin-Williams Company, Cook Paint & Varnish Company, and itself, on forms prescribed by you, upon receipt of said amount, and simultaneously therewith.

Yours very truly,
A. H. Schultz."

The statement enclosed with the foregoing letter was as follows:

Eastman by Roy H. Ekstrand or the agreement as to the Ekstrand profit, concerning which Eastman testified. Roy H. Ekstrand admitted seeing Eastman make the penciil memorandum entries but he stated that he did not see what he actually wrote on the paper. The memorandum is in part as follows:

"Sherwin Wms. ..... 4956.95
H. L. ..... 1213.37
Cook ..... 3463.43
Ken ..... 1968.12

---

2723.07
Profit to Ken ..... 313.03

Schmitz Mills ..... 3066.99"

Eastman testified that after the matter of the Ekstrand profit had been settled, the discussion turned to the release given by Ekstrand to Severin and that no agreement could be reached as to the meaning of the terms of said release. Roy H. Ekstrand testified that the discussion concerning the release became so acrimonious that the conferences ended with his declaration that the construction of said release would have to be left to the courts.

Thereafter the following letter was sent by Schmitz to Severin:

"Chicago, Illinois
May 13, 1937

K. P. Severin Company
222 W. Adams St.
Chicago, Illinois

Gentlemen:

Enclosed herewith find statement of the Ekstrand Paint & Supply Company, for material furnished to us, and used under my contract on the Vanhoite High School, in Kansas City, Kansas. This statement is correct, and should be paid to Ekstrand Paint & Supply Company as soon as possible. It is ready to deliver to you the release of Sam Lofton Paint Company, The Sherwin-Williams Company, Cook Paint & Varnish Company, and itself, on forms prescribed by you, upon receipt of said amount, and simultaneously therewith.

Yours very truly,
A. E. Schmitz."

The statement enclosed with the foregoing letter was as follows:

"Invoice

EKSTRAND PAINT & SUPPLY CO.
Jobbers -- Distributors
5219 North Clark Street
Chicago, Ill.

SOLD TO A. H. SCHULTZ,
1353 Bryn Mawr Avenue
Chicago, Illinois.

Date May 11, 1937

To materials furnished for
Wyandotte High School,
Kansas City, Kansas $4,753.87"

On May 19, 1937, Ekstrand wrote a letter to Severin requesting payment of $4,753.87 for the painting materials furnished Schultz for the high school project and in response thereto Severin wrote Ekstrand that the latter's request for the payment of $4,753.87 had been turned over to the attorney for Severin. Shortly thereafter this action was instituted by Ekstrand to recover from Severin and the sureties on the Severin bond a claimed balance of $4,203.87, after allowing a credit of $550, which amount had been theretofore paid on account.

It will be noted that the $4,753.87 bill rendered by Ekstrand to Schultz and in turn sent by him to Severin is exactly $2,000 more than the figures admittedly furnished by Roy H. Ekstrand to Eastman at the aforesaid conference as covering all the materials furnished by the three Kansas City firms as well as those furnished by Ekstrand, which figures aggregated $2,753.87. According to Roy H. Ekstrand, he arrived at the amount of $4,753.87 by checking over with Schultz the quantities shown on the latter's delivery tickets item by item with the prices charged on the Kansas City firms' invoices to Ekstrand and the charges on Ekstrand's own books and determined the proper charge to be made for such items to Schultz, which the latter approved. Roy H. Ekstrand testified further that the charges embraced in the $4,753.87 invoice to Schultz were agreed to by Schultz before the conference with Eastman but that the

"Invoice

KETTLAND PAINT & GLASS CO.
Jobbers -- Distributors
5219 North Clark Street
Chicago, Ill.

SOLD TO E. H. SCHULZ,
1323 Grand Ave. Avenue
Chicago, Illinois.

Date May 11, 1937

To materials furnished for
Pembroke High School,
Kansas City, Kansas $4,753.87"

On May 19, 1937, Ketland wrote a letter to Severin requesting payment of $4,753.87 for the painting materials furnished Schulz for the high school project and in response thereto Severin wrote Ketland that the latter's request for the payment of $4,753.87 had been turned over to the attorney for Severin. Shortly thereafter this action was instituted by Ketland to recover from Severin and the sureties on the Severin bond a claimed balance of $4,203.87, after allowing a credit of $550, which amount had been theretofore paid on account.

It will be noted that the $4,753.87 bill rendered by Ketland to Schulz and in turn sent by him to Severin is exactly $2,000 more than the figures admitedly furnished by Roy H. Ketland to Eastman at the aforesaid conference as covering all the materials furnished by the three Kansas City firms as well as those furnished by Ketland, which figures aggregated $2,753.87. According to Roy H. Ketland, he arrived at the amount of $4,753.87 by checking over with Schulz the quantities shown on the Letter's delivery tickets item by item with the prices charged on the Kansas City firms' invoices to Ketland and the charges on Ketland's own books and determined the proper charge to be made for such items to Schulz, which the latter approved. Roy H. Ketland testified further that the charges embraced in the $4,753.87 invoice to Schulz were agreed to by Schulz before the conference with Eastman but that the

typewritten invoice sheets itemizing such charges, bearing date May 11, 1937, which were received in evidence, were not prepared until after the conference with Eastman. Schultz did not remember whether he approved the Ekstrand $4,753.87 bill for materials before or after the conference with Eastman.

The trial judge decided this case by allowing the full amount of the Ekstrand claim of $4,753.87 and deducting therefrom the $550 paid on account and the $2,000 specified in the Ekstrand release, which left a balance due plaintiffs of $2,203.87 and he further allowed $661.16 interest on said amount, making the total damages assessed in plaintiffs' favor $2,865.03.

The two principal questions presented for our determination are whether the trial court erred as to the amount and the manner in which plaintiffs' damages were assessed and in its construction of the release given by Ekstrand to Severin.

In our opinion the finding of the trial court that plaintiffs were entitled to an allowance of $4,753.87 for the materials furnished to Schultz was against the manifest weight of the evidence. When Schultz had fully completed his work under his subcontract on or about April 7, 1937, he sent Severin a statement for $2,931.50, which was for "all material used on above project." This statement, in so far as it pertained to the accounts due to the three Kansas City firms, was 10% higher than the amounts admittedly due them from Ekstrand for the materials which they furnished. The cost of the painting materials for the high school project was considered at the conference between Roy H. Ekstrand, Schultz and Eastman late in April or early in May, 1937. Schultz seemingly had no recollection as to what happened at that conference. Roy H. Ekstrand admitted that at said conference the matter of Ekstrand's profit was discussed and he further admitted that he gave the exact amounts to Eastman at which the materials furnished by Ekstrand were charged and at which the materials fur-

typewritten invoice sheets itemizing with charges, bearing date May 11, 1937, which were received in evidence, were not prepared until after the conference with Eastman. Schulte did not remember whether he approved the sketches $4,753.87 bill for materials before or after the conference with Eastman.

The trial judge decided this case by allowing the full amount of the Eastman claim of $4,753.87 and deducting therefrom the $550 paid on account and the $2,000 specified in the Eastland release, which left a balance due plaintiffs of $2,203.87 and he further allowed 6% interest on said amount, making the total damages assessed in plaintiffs' favor $2,867.03.

The two principal questions presented for our determination are whether the trial court erred as to the amount and the manner in which plaintiffs' damages were assessed and in its construction of the release given by Eastland to Severin.

In our opinion the finding of the trial court that plaintiffs were entitled to an allowance of $4,753.87 for the materials furnished to Schulte was against the manifest weight of the evidence. When Schulte had fully completed his work under his subcontract on or about April 7, 1937, he sent Severin a statement for $2,931.50, which was for "all material used on above project." This statement, in so far as it pertained to the amounts due to the three lumber city firms, was like those upon the amounts admittedly due them from Eastland for the materials which they furnished. The cost of the painting materials for the high school project was considered at the conference between Roy E. Eastland, Schulte and Eastman late in April or early in May, 1937. Schulte seemingly had no recollection as to what happened at that conference. Roy E. Eastland admitted that at said conference the matter of Eastland's profit was discussed and he further admitted that he gave the exact amounts to Eastman at which the materials furnished by Eastland were charged and at which the materials fur-

nished by the three Kansas City concerns were invoiced to Ekstrand. As already shown, these amounts aggregated $2,753.87. It will be recalled that Eastman testified that it was agreed that 15% of that amount or $313.03 would be a fair profit for Ekstrand and that Roy H. Ekstrand denied that such an agreement was made. However, the conference did not break up over that phase of the discussion but rather because Roy H. Ekstrand and Eastman and the attorney for Severin were unable to agree on the meaning of the provisions of the release. It must be borne in mind that Roy H. Ekstrand did not even mention at that conference any agreement between him and Schultz that $4,753.87 was a "correct" charge for the materials. The fact that it was not mentioned demonstrates conclusively that such a charge had not been considered or contemplated by Ekstrand prior to the conference. If it had been, it would unquestionably have been presented at that time and place, since the purpose of the conference was to settle both the cost of the materials and the profit of Ekstrand. It is a most peculiar circumstance that, after the disagreement as to the meaning of the release, Roy H. Ekstrand and Schultz should get together and agree to fix the cost of the materials at $4,753.87, an increase of $2,000 over the actual cost of the materials to Ekstrand. That the increase is in the exact amount of the waiver provided in the release is also significant. We think that the compilation of the $4,753.87 charge was purely an afterthought. No attempt was made to show that such was a fair and reasonable charge for the materials furnished. It is not claimed that it was a reasonable charge but merely that Schultz agreed to it. As has been seen, no advance agreement was made as to the price to be charged by Ekstrand for the materials. It was of course anticipated by all concerned that Ekstrand would be entitled to realize a reasonable profit on the materials furnished, all of which, with the

mished by the three Kansas City concerns were involved to Ekstrand. As already shown, these amounts aggregated $2,723.87. It will be recalled that Eastman testified that it was agreed that 15% of that amount or $313.03 would be a fair profit for Ekstrand and that Roy H. Ekstrand denied that such an agreement was made. However, the conference did not break up over that phase of the discussion but rather because Roy H. Ekstrand and Eastman and the attorney for Severin were unable to agree on the meaning of the provisions of the release. It must be borne in mind that Roy H. Ekstrand did not even mention at that conference any agreement between him and Schmitz that $4,723.87 was a "correct" charge for the materials. The fact that it was not mentioned demonstrates conclusively that such a charge had not been considered or contemplated by Ekstrand prior to the conference. If it had been, it would unquestionably have been presented at that time and place, since the purpose of the conference was to settle both the cost of the materials and the profit of Ekstrand. It is a most peculiar circumstance that, after the disagreement as to the meaning of the release, Roy H. Ekstrand and Schmitz should get together and agree to fix the cost of the materials at $4,723.87, an increase of $2,500 over the actual cost of the materials to Ekstrand. That the increase is in the exact amount of the waiver provided in the release is also significant. We think that the compilation of the $4,723.87 charge was purely an afterthought. No attempt was made to show that such was a fair and reasonable charge for the materials furnished. It is not claimed that it was a reasonable charge but merely that Schmitz agreed to it. As has been seen, no advance agreement was made as to the price to be charged by Ekstrand for the materials. It was of course anticipated by all concerned that Ekstrand would be entitled to realize a reasonable profit on the materials furnished, all of which, with the

exception of the small amount furnished by Ekstrand, were supplied by the Kansas City concerns. The handling and delivery of the major portion of the materials entailed no expense upon Ekstrand. While it is true that the invoice for $4,753.87 was made out to Schultz, it was never intended that he would personally pay it or any part of it. As far as Schultz was concerned, the invoice might just as well have been for even a much larger amount. It was clearly the intention of Ekstrand to foist this unreasonable charge upon Severin and this the law will not permit under the circumstances shown here. After Schultz had sent the statement to Severin showing that the total cost of "all material used" on the high school project was $2,931.50, after Roy H. Ekstrand admitted that the total cost of the materials to Ekstrand was $2,753.87 and after Roy H. Ekstrand failed to even mention the charge of $4,753.87 at the conference called for the purpose of considering the cost of the materials and the amount that should be allowed Ekstrand as a reasonable profit thereon, ordinary principles of common honesty and fair business dealing preclude recognition of the agreement between Roy H. Ekstrand and Schultz to charge Severin $4,753.87 for the painting materials used on the high school project as valid and binding upon Severin.

We will now consider the release given by Ekstrand to Severin Said release provides that Ekstrand "agrees to furnish and ship to A. H. Schultz, for use in the execution of a contract for the painting and finishing of the Wyandotte High School, Kansas City, Kansas, material as required by said contract and conforming to the requirements thereof in the value of Two Thousand Dollars" and that Ekstrand "does further release N. P. Severin Company and its Sureties and the Owner of the Wyandotte High School, Kansas City, Kansas, of all claims and demands whatsoever to the amount of Two Thousand Dollars ***, over and above the reasonable value of all materials paid for by either N. P.

exception of the small amount furnished by Eastrand, were supplied by the Kansas City concerns. The handling and delivery of the major portion of the materials entailed no expense upon Eastrand. While it is true that the invoice for $4,723.87 was made out to Schultz, it was never intended that he would personally pay it or any part of it. As far as Schultz was concerned, the invoice might just as well have been for even a much larger amount. It was clearly the intention of Eastrand to foist this unreasonable charge upon Severin and this the law will not permit under the circumstances shown here. After Schultz had sent the statement to Severin showing that the total cost of "all material used" on the high school project was $8,131.50, after Roy H. Eastrand admitted that the total cost of the materials to Eastrand was $4,723.87 and after Roy H. Eastrand failed to even mention the charge of $4,723.87 at the conference called for the purpose of considering the cost of the materials and the amount that should be allowed Eastrand as a reasonable profit thereon, ordinary principles of common honesty and fair business dealing preclude recognition of the agreement between Roy H. Eastrand and Schultz to charge Severin $4,723.87 for the painting materials used on the high school project as valid and binding upon Severin.

We will now consider the release given by Eastrand to Severin. Said release provides that Eastrand "agrees to furnish and ship to A. H. Schultz, for use in the execution of a contract for the painting and finishing of the Wyandotte High School, Kansas City, Kansas, material as required by said contract and conforming to the requirements thereof in the value of Two Thousand Dollars" and that Eastrand "does further release H. P. Severin Company and its Sureties and the Owner of the Wyandotte High School, Kansas City, Kansas, of all claims and demands whatsoever to the amount of Two Thousand Dollars ($2000), over and above the reasonable value of all materials paid for by either H. P.

Severin Company or A. H. Schultz on account of labor or materials, or both, furnished, or which may be furnished by the undersigned [Ekstrand] for the said building."

In our opinion filed on a prior appeal of this case we said that the release was ambiguous and we are still of that opinion, notwithstanding defendants' assertion that its language is clear and understandable. It becomes even more ambiguous when considered in connection with that portion of paragraph seven of Schultz's subcontract which states that "the subcontractor agrees to secure from the Ekstrand Paint & Supply Company a release issued for the benefit of the contractor by the Ekstrand Paint & Supply Company, which will waive the right of any claim for materials furnished by the Ekstrand Paint & Supply Company to a total amount of $2,000."

Thus in the release Ekstrand agreed to waive all claims to the extent of $2,000 "over and above the reasonable value of all materials paid for by either N. P. Severin Company or A. H. Schultz" and under the subcontract Schultz was required to procure a release from Ekstrand for the benefit of Severin, "which will waive the right of any claim for materials furnished by the Ekstrand Paint and Supply Company to a total amount of $2,000." Severin drafted both the release and the subcontract and therefore both instruments must be construed most strongly against defendants.

It will be noted from the release that Severin contemplated that the painting material requirements would be of the value of $2,000. According to defendants, the release should be construed to mean that,if plaintiffs furnished $2,000 worth of materials and neither Severin nor Schultz saw fit to pay anything on account of such materials, plaintiffs must be held to have waived all right to recover anything from the defendants herein for the materials so furnished, and if Ekstrand furnished materials of a greater value and neither

Severin Company or A. H. Schmitz on account of labor or materials, or both, furnished, or which may be furnished by the undersigned [Eastern] for the said building."

In our opinion filed on a prior appeal of this case we said that the release was ambiguous and we are still of that opinion, notwithstanding defendants' assertion that its language is clear and understandable. It becomes even more ambiguous when considered in connection with that portion of paragraph seven of Schmitz's subcontract which states that "the subcontractor agrees to secure from the Eastern Paint & Supply Company a release issued for the benefit of the contractor by the Eastern Paint & Supply Company, which will waive the right of any claim for materials furnished by the Eastern Paint & Supply Company to a total amount of $2,000."

Thus in the release Eastern agreed to waive all claims to the extent of $2,000 "over and above the reasonable value of all materials paid for by either S. F. Severin Company or A. H. Schmitz" and under the subcontract Schmitz was required to procure a release from Eastern for the benefit of Severin, "which will waive the right of any claim for materials furnished by the Eastern Paint and Supply Company to a total amount of $2,000." Severin drafted both the release and the subcontract and therefore both instruments must be construed most strongly against defendants.

It will be noted from the release that Severin contemplated that the painting material requirements would be of the value of $2,000. According to defendants, the release should be construed to mean that, if plaintiffs furnished $2,000 worth of materials and neither Severin nor Schmitz saw fit to pay anything on account of such materials, plaintiffs must be held to have waived all right to recover anything from the defendants herein for the materials so furnished, and if Eastern furnished materials of a greater value and neither

Severin nor Schultz saw fit to pay anything on account of such materials, then plaintiffs must be held to have waived as to defendants $2,000 of the amount of their claim for materials, even though Severin still owed Schultz a balance under his subcontract, or in other words that plaintiffs' release constituted as to defendants a flat waiver of $2,000 of the value of the materials furnished. It is inconceivable that the parties intended such a result.

The provisions of the release call for explanation. The only explanation offered in defendants' behalf was that attempted by their witness Eastman, when he testified that "we would give them a contract if we could have any security that the material would be furnished and that they would be financially able to complete the job; that if they gave us a guarantee from one or more manufacturers that these manufacturers in the first place agreed to furnish so much material, and, in the second place, would agree to release us of a certain amount of obligation, then we would feel sufficiently protected to give them a contract." This attempted explanation did not explain. It was as ambiguous as the release itself.

The only reasonable explanation as to the meaning of the release and the intention of the parties in regard thereto was that offered by Roy H. Ekstrand. He testified: "I told him [Eastman] that that release did not release $2,000 as such; that we expected, through that release, to waive materials up to the amount of $2,000, as far as the N. P. Severin Company was concerned and looked to the subcontractor's balance in his account for the first $2,000 *** We limited the amount of money that we would look to from Schultz to $2,000. We refused to take a chance on anything over $2,000, looking to the contract to produce the first $2,000 of our contract. I stated at that time, if my memory serves me right, that due to the $2,000

Severin not consider it fit to pay anything on account of such materials, then plaintiffs must be held to have waived as to defendants $2,000 of the amount of their claim for materials, even though Severin still owed Consolidated a balance under his subcontract, or in other words that plaintiffs' release constituted as to defendants a flat waiver of $2,000 of the value of the materials furnished. It is inconceivable that the parties intended such a result.

The provisions of the release call for explanation. The only explanation offered in defendants' behalf was that attempted by their witness Eastman, when he testified that "we would give them a contract if we could have any security that the material would be furnished and that they would be financially able to complete the job; that if they gave us a guarantee from one or more manufacturers that these manufacturers in the first place agreed to furnish so much material, and, in the second place, would agree to release us of a certain amount of obligation, then we would feel sufficiently protected to give them a contract." This attempted explanation did not explain. It was as ambiguous as the release itself.

The only reasonable explanation as to the meaning of the release and the intention of the parties in regard thereto was that offered by Roy H. Eastman. He testified: "I told him [Eastman] that that release did not release $2,000 as such; that we expected, through that release, to waive materials up to the amount of $2,000, as far as the M. J. Severin Company was concerned and looked to the subcontractor's balance in his account for the first $2,000 *** We limited the amount of money that we would look to from Consolidated to $2,000. We refused to take a chance on anything over $2,000, looking to the contract to produce the first $2,000 of our contract. I stated at that time, if my memory serves me right, that due to the $2,000

waiver, and the fact that only $1,600 was available for payment that we stood to lose $400 of our bills." The effect of the testimony of Roy K. Ekstrand was that it was intended by the release that plaintiffs would have to look to the money due Schultz under his subcontract for the payment of the first $2,000 on account for the materials furnished by them. This seems to be a reasonable explanation and it was the only explanation offered as to the meaning of the release. Plaintiffs had received $550 on account and Eastman admitted there was $1,050 due and owing to Schultz under his subcontract. That made $1,600 applicable under the subcontract to payment for the materials. Therefore plaintiffs under the terms of the release must be held to have suffered a loss of $400 of the $2,000, for the payment of which they had to look to Schultz or the money due him under his subcontract.

There is no merit in defendants contention that an action on the statutory bond involved herein could only be properly brought in the name of the state of Kansas, the obligee in said bond, for the use of plaintiffs. It is ordinarily true that an action on a bond must be between the parties to it but this proceeding was instituted under section 60-1414 of the General Statutes of Kansas (Corrick Annotated Statutes, 1935) which expressly provides that "any person to whom there is due any sum for labor or material furnished *** may bring an action on such bond [required under the preceding section] for the recovery of such indebtedness."

Having held that the allowance by the trial court of plaintiffs' $4,753.87 charge for the materials furnished was against the manifest weight of the evidence, it is incumbent upon us to determine from the preponderance of the evidence the amount of damages plaintiffs are entitled to recover. The trial court should have found that the proper charge for the materials furnished directly by Ekstrand was $198.12 and that the actual

waiver, and the fact that only $1,600 was available for payment that we stood to lose $400 of our bills." The effect of the testimony of Roy K. Eastman was that it was intended by the release that plaintiffs would have to look to the money due Schmitz under his subcontract for the payment of the first $2,000 on account for the materials furnished by them. This seems to be a reasonable explanation and it was the only explanation offered as to the meaning of the release. Plaintiffs had received $750 on account and Eastman admitted there was $1,050 due and owing to Schmitz under his subcontract. That made $1,600 applicable under the subcontract to payment for the materials. Therefore plaintiffs under the terms of the release must be held to have suffered a loss of $400 of the $2,000, for the payment of which they had to look to Schmitz or the money due him under his subcontract.

There is no merit in defendants contention that an action on the statutory bond involved herein could only be properly brought in the name of the state of Kansas, the obligee in said bond, for the use of plaintiffs. It is ordinarily true that an action on a bond must be between the parties to it but this proceeding was instituted under section 60-1414 of the General Statutes of Kansas (Corrick Annotated Statutes, 1935) which expressly provides that "any person to whom there is due any sum for labor or material furnished *** may bring an action on such bond [required under the preceding section] for the recovery of such indebtedness."

Having held that the allowance by the trial court of plaintiffs' $4,723.07 charge for the materials furnished was against the manifest weight of the evidence, it is incumbent upon us to determine from the preponderance of the evidence the amount of damages plaintiffs are entitled to recover. The trial court should have found that the proper charge for the materials furnished directly by Eastman was $1,921.12 and that the actual

cost to Ekstrand of the materials furnished by the three Kansas City concerns was $2,555.75. These were the charges admittedly given by Roy H. Ekstrand to Severin and they amount to a total of $2,753.87. The trial court should have further found that Ekstrand and Severin agreed that 15% of said $2,753.87 or $313.03 would be a fair and reasonable profit to Ekstrand on the materials furnished. As opposed to the uncorroborated testimony of Roy H. Ekstrand that there was no agreement made as to the Ekstrand profit, there is the testimony of Eastman that the aforesaid agreement was made and his testimony in this regard is corroborated by the pencil memorandum made in the immediate presence of Roy H. Ekstrand indicating that such an agreement was made. Roy H. Ekstrand admitted that the matter of the Ekstrand profit was discussed but he gave no indication as to the result of that discussion. In our opinion plaintiffs are entitled to an allowance of $2,753.87, plus a profit thereon of $313.03, making their total allowance $3,066.90. From this allowance must be deducted $550 paid them on account and the loss of $400 sustained by them under the terms of their release, leaving a balance due them of $2,116.90. In addition to such balance they are entitled to interest thereon at the rate of 5% per annum from April 7, 1937 to April 6, 1944, amounting to $740.90, making the total amount of plaintiffs' damages $2,857.80.

For the reasons stated herein the judgment of the trial court is reversed and judgment is entered here in debt against defendants for $1,308,000 and plaintiffs' damages are assessed at $2,857.80, the debt to be discharged pro tanto on the payment of said damages and costs and execution to issue therefor as to all of the defendants except the Continental Illinois National Bank & Trust Company of Chicago, executor of the estate of A. N. Severin, deceased, as to which defendant plaintiffs' damages are to be paid in due course of administration.

JUDGMENT REVERSED AND JUDGMENT HERE.

Friend, P. J., and Scanlan, J., concur.

cost to Eastern of the materials furnished by the three Ionia City concerns was $4,333.77. These were the charges additionally given by Roy E. Eastern to carrying and they amount to a total of $8,723.77. The total cost should have further total that Eastern and Severin agreed that 10% or only $2,723.77 or $143.43 would be a fair and reasonable profit to contract on the materials furnished. As opposed to the uncorroborated testimony of Roy E. Eastern that there was no agreement made as to the contract profit, there is the testimony of Severin that the aforesaid agreement was made and his testimony in this regard is corroborated by the yearly accounts made in the business of Roy E. Eastern indicating that such an agreement was made. Roy E. Eastern admitted that the matter of the contract profit was discussed but he gave no indication as to the result of that discussion. In our opinion plaintiffs are entitled to an allowance of $8,723.77, plus a profit thereon of $143.43, making their total allowance $8,866.20. From this allowance must be deducted $330 paid them on account and the loss of two machines by them under the terms of their policies, leaving a balance due them of $8,113.20. In addition to such balance they are entitled to interest thereon at the rate of 5% per annum from April 7, 1937 to April 6, 1944, amounting to $740.70, making the total amount of plaintiffs' damages $8,853.90.

For the reasons stated herein the judgment of the trial court is reversed and judgment is entered here in favor against defendants for $1,300.00 and plaintiffs' damages are assessed at $8,853.90, the sum to be distributed pro rata on the payment of said damages and costs and execution to issue therefor as to all of the defendants except the Continental Illinois National Bank & Trust Company of Chicago, receiver of the estate of E. W. Severin, deceased, as to which defendants plaintiffs' damages are to be paid in due course of administration.

JUDGMENT REVERSED AND JUDGMENT HERE.

Friend, P. J., and Dunlap, J., concur.

42980

408130

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

WILLIAM F. KATELHUT,
Plaintiff in Error.

) ERROR TO MUNICIPAL
) COURT OF CHICAGO.

322 I.A. 693

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This writ of error seeks to reverse the judgment order of the trial court which found the defendant, William F. Katelhut, guilty of contempt of court and sentenced him to serve 60 days in the County Jail as punishment for such contempt.

Defendant was a police officer of the Chicago Park District. On July 25, 1943 he arrested one Edgar Morgan for indecent exposure and brought him to the Hyde Park Police Station, where he was charged with disorderly conduct. Morgan was released on bond furnished by John H. Coleman. On July 26, 1943 Morgan's case appeared on the call of Judge Leon Edelman in the branch of the Municipal court of Chicago located at 4802 S. Wabash avenue. When the case of City of Chicago v. Edgar Morgan was called for trial, a young colored man stepped up to the bar of the court, answering as the defendant. The arresting officer, Katelhut, also stepped up to the bar of the court when the Morgan case was called. The trial judge upon examining the arrest slip attached to the complaint discovered that the Edgar Morgan who had been arrested by Officer Katelhut was described on said arrest slip as a white man, gray haired, 70 years old and 5 feet 9-1/2 inches tall. The arrest slip also indicated that he was a banker by occupation and resided at the Hyde Park Hotel. Judge Edelman asked the colored man who appeared at the bar of the court as the defendant, Edgar Morgan, whether he had told the arresting officer that he lived at the Hyde Park Hotel, that he was 70 years of age and that he was a banker by occupation, and he answered that he was so drunk at the time of his arrest

42980

THE PEOPLE OF THE STATE OF ILLINOIS,
defendant in error,

v.

WILLIAM F. KATSLAKIS,
Plaintiff in error.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT:

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Defendant was a police officer of the Chicago Park District. On July 29, 1943 he arrested one Edgar Morgan for indecent exposure and brought him to the Hyde Park Police Station, where he was charged with disorderly conduct. Morgan was released on bond furnished by John H. Coleman. On July 26, 1943 Morgan's case appeared on the call of Judge Leon Lindman in the branch of the Municipal court of Chicago located at 4802 S. Wabash avenue. When the case of City of Chicago v. Edgar Morgan was called for trial, a young colored man stepped up to the bar of the court, answering as the defendant. The arresting officer, Katslakis, also stepped up to the bar of the court when the Morgan case was called. The trial judge upon examining the arrest slip attached to the complaint discovered that the Edgar Morgan who had been arrested by Officer Katslakis was described on said arrest slip as a white man, gray haired, 70 years old and 5 feet 9-1/2 inches tall. The arrest slip also indicated that he was a banker by occupation and resided at the Hyde Park Hotel. Judge Lindman asked the colored man who appeared at the bar of the court as the defendant, Edgar Morgan, whether he had told the arresting officer that he lived at the Hyde Park Hotel, that he was 70 years of age and that he was a banker by occupation, and he answered that he was so drunk at the time of his arrest

he did not know. Then Judge Edelman asked the arresting officer what person made out the arrest slip at the Hyde Park Police Station and Katelhut stated that he made it out and had written thereon the answers given him by the man he had arrested. Officer Katelhut was also asked if the negro who answered as Edgar Morgan, was the defendant, Edgar Morgan, whom he had arrested on July 25, 1943, and he replied that he was. The trial judge asked the colored man if he was Edgar Morgan and he said that he was. The colored man was then asked if he made the answers that appeared on the arrest slip and if he was a banker, and he again replied that he was drunk at the time of his arrest and did not remember, but that he was a porter. Judge Edelman inquired of John H. Coleman, who was present in court, if the Edgar Morgan for whose release he had furnished bond, was the colored man before the bar of the court and Coleman answered that he was. Thereupon the court ordered Officer Katelhut to take the colored man into custody. Judge Edelman directed that an investigation be made as to all the facts and circumstances in connection with the arrest of Edgar Morgan, his release on bond and the appearance of the colored man in his place and stead to answer to the charge of disorderly conduct preferred against said Morgan by Officer Katelhut, and continued the case of City of Chicago v. Edgar Morgan to July 30, 1943. After the inquiry had been ordered and the case continued but while the court was still in session, Officer Katelhut rushed into the courtroom and informed Judge Edelman that the colored man had escaped. The colored man had not been apprehended up to the time the judgment order was entered herein and his real name had not been ascertained.

When the disorderly charge against Edgar Morgan was again called for trial on July 30, 1943, the real Edgar Morgan was present to answer to said charge. Officer Katelhut was also present at that time and admitted in open court to Judge Edelman

he did not know. Then Judge Adelman asked the arresting officer what person made out the arrest slip at the Hyde Park Police Station and Ketelhut stated that he made it out and had written thereon the answers given him by the man he had arrested. Officer Ketelhut was also asked if the person who answered as Edgar Morgan, was the defendant, Edgar Morgan, whom he had arrested on July 25, 1943, and he replied that he was. The trial judge asked the colored man if he was Edgar Morgan and he said that he was. The colored man was then asked if he made the answers that appeared on the arrest slip and if he was a bunker, and he again replied that he was drunk at the time of his arrest and did not remember, but that he was a porter. Judge Adelman inquired of John H. Coleman, who was present in court, if the Edgar Morgan for whose release he had furnished bond, was the colored man before the bar of the court and Coleman answered that he was. Thereupon the court ordered Officer Ketelhut to take the colored man into custody. Judge Adelman directed that an investigation be made as to all the facts and circumstances in connection with the arrest of Edgar Morgan, his release on bond and the appearance of the colored man in his place and stead to answer to the charge of disorderly conduct preferred against said Morgan by Officer Ketelhut, and continued the case of City of Chicago v. Edgar Morgan to July 30, 1943. After the inquiry had been ordered and the case continued but while the court was still in session, Officer Ketelhut rushed into the courtroom and informed Judge Adelman that the colored man had escaped. The colored man had not been apprehended up to the time the judgment order was entered herein and his real name had not been ascertained.

When the disorderly charge against Edgar Morgan was again called for trial on July 30, 1943, the real Edgar Morgan was present to answer to said charge. Officer Ketelhut was also present at that time and admitted in open court to Judge Adelman

that the statements were false, which he had theretofore made to the court regarding the identity of the colored man who appeared in the place and stead of Edgar Morgan when the disorderly conduct charge against the latter was called for trial on July 26, 1943 and that he made such false statements to shield and protect others. Officer Katelhut was then charged with contempt of court and the disorderly conduct charge against Edgar Morgan and said contempt charge against Katelhut were both continued until August 12, 1943. The contempt charge was again continued to August 13, 1943, when the trial court entered its judgment order, which, after reciting the facts heretofore set forth, found that "the said John H. Coleman and the said William Katelhut are now present in court and the Court finds that it has jurisdiction of the parties hereto and of the subject matter thereof, and because of the actions of the said Katelhut and Coleman, finds each of them guilty of Contempt of this Court and sentences the said William Katelhut to sixty (60) days in the County Jail for such Contempt and sentences the said John H. Coleman to six (6) months in the County Jail for such contempt."

It will be noted that the bondsman, John H. Coleman, was also found guilty of contempt but the judgment order as to him is not before us for review.

Defendant urges eleven grounds for reversal, many of which are repetitious. He contends that he purged himself by his answer to the rule to show cause. It is sufficient answer to this contention to state that a disavowal of his intention to commit a direct contempt can be of no avail to him as justification for his deliberate misrepresentation to the court that the colored man was the real defendant he had arrested and charged with disorderly conduct. While it is true that the trial court entered a rule on defendant on July

that the statements were false, which he had therefore made to the court regarding the identity of the relief man who appeared in the place and stead of Edgar Morgan upon the disorderly conduct charge against the latter and called for trial on July 20, 1942 and that he made such false statements to shield and protect others. Petitioner Ketchum was then charged with contempt of court and the disorderly conduct charge against Edgar Morgan and said contempt charge against Ketchum were both continued until August 18, 1942. The contempt charge was again continued to August 13, 1943, when the trial court entered its judgment order, which, after reciting the facts heretofore set forth, found that "the said John H. Coleman and the said William Ketchum are now present in court and the Court finds that it has jurisdiction of the parties hereto and of the subject matter thereof, and because of the actions of the said Ketchum and Coleman, finds each of them guilty of Contempt of this Court and sentences the said William Ketchum to sixty (60) days in the County Jail for such Contempt and sentences the said John H. Coleman to six (6) months in the County Jail for such contempt."

It will be noted that the Bondsman, John H. Coleman, was also found guilty of contempt but the judgment order as to him is not before us for review.

Petitioner urges eleven grounds for reversal, many of which are repetitious. He contends that he purged himself by his answer to the rule to show cause. It is sufficient answer to this contention to state that a disavowal of his intention to commit a direct contempt can be of no avail to him in justification for his deliberate misrepresentation to the court that the colored man was the real defendant he had arrested and charged with disorderly conduct. While it is true that the trial court entered a rule on defendant on July

30, 1943 to show cause by August 12, 1943 why he should not be punished for contempt of court and while it is also true that defendant filed an answer to said rule in which he again admitted his contempt but attempted to purge himself thereof, such rule and the answer thereto were superfluous and should be so considered and disregarded, since defendant was guilty of a flagrant contempt committed in the very face of the court. This was a direct criminal contempt for which the court had the power to punish Katelhut summarily without any further proof or examination and without petition, affidavit or rule to show cause.

Defendant's contention that the trial court erred in failing to warn him that his answers might incriminate him does not merit serious consideration. His contention that the judgment order was erroneously entered because it failed to state that his false statements were material hasn't the slightest merit. While the judgment order did not use the word "material" in connection with defendant's false statements, it recited said false statements and the circumstances under which they were made and such statements and circumstances speak for themselves as being material.

There is no merit in defendant's contention that he could not be held in direct contempt unless his false statements were made under oath. While the record does not disclose whether or not Officer Katelhut had been sworn as a witness when he made the false statements in response to the court's questions as to the identity of the colored man who appeared in place of the real defendant when the disorderly conduct charge against Edgar Morgan was called for trial, it was not material whether he was or was not sworn, since the finding that he was guilty of direct contempt was not predicated upon perjury committed by him but upon his contemptuous conduct in attempting by his

30, 1943 to show cause by August 12, 1943 why he should not be punished for contempt of court and while it is also true that defendant filed an answer to said rule in which he again admitted his contempt but attempted to purge himself thereof, such rule and the answer thereto were superfluous and should be so considered and disregarded, since defendant was guilty of a flagrant contempt committed in the very face of the court. This was a direct criminal contempt for which the court had the power to punish Ketelhut summarily without any further proof or examination and without petition, affidavit or rule to show cause.

Defendant's contention that the trial court erred in failing to warn him that his answers might incriminate him does not merit serious consideration. His contention that the judgment order was erroneously entered because it failed to state that his false statements were material lacks the slightest merit. While the judgment order did not use the word "material" in connection with defendant's false statements, it recited said false statements and the circumstances under which they were made and such statements and circumstances speak for themselves as being material.

There is no merit in defendant's contention that he could not be held in direct contempt unless his false statements were made under oath. While the record does not disclose whether or not Officer Ketelhut had been sworn as a witness when he made the false statements in response to the court's questions as to the identity of the colored man who appeared in place of the real defendant when the disorderly conduct charge against Edgar Morgan was called for trial, it was not material whether he was or was not sworn, since the finding that he was guilty of direct contempt was not predicated upon perjury committed by him but upon his contemptuous conduct in attempting by his

false answers in the presence and hearing of the trial judge to perpetrate a fraud upon the court and thereby impede the administration of justice. A complete answer to the instant contention is found in People v. Gard, 259 Ill. 238. In that case Police Officer Edward S. Gard appeared in the Criminal court on November 21, 1910 in answer to a writ of habeas corpus, producing one William Schubert, who had been theretofore arrested and detained by the police as a suspect in a robbery case. Upon Gard's request the hearing was continued until November 23, 1910. On November 22, 1910 Gard procured two municipal court warrants for Schubert - one for vagrancy and one for adultery. Gard turned one of these warrants over to another police officer and kept the other in his own possession. On November 23, 1910 Gard again produced Schubert in court in obedience to the writ of habeas corpus. When no identification of Schubert was made in connection with the robbery which he was suspected of having committed, Judge Kickham Scanlan, before whom the hearing was had, inquired of Gard if he had any other charges against Schubert. Gard answered that he had not, by shaking his head in the negative. Thereupon an order was entered discharging Schubert, and with a copy or memorandum of the order he and his counsel went to the jail to have the jailer discharge him. Officer Gard preceded them to the jail and there proposed to arrest Schubert under one of the warrants he had sworn out in the municipal court the day before and which he had had in his possession ever since it was issued. Upon being remonstrated with by Schubert's counsel and told he was guilty of contempt of court in deceiving the court by his answers to the court's inquiries, he was induced to go with counsel for Schubert before the court, where counsel related what had occurred. In that case the Supreme court said at pp. 241, 242:

"The contempt of which plaintiff in error was adjudged

false answers in the presence and hearing of the trial judge to perpetrate a fraud upon the court and thereby impede the administration of justice. A complete answer to the instant contention is found in People v. Ford, 279 Ill. 534. In that case Police Officer Edward S. Ford appeared in the Criminal court on November 21, 1911 in answer to a writ of habeas corpus, producing one William Schubert, who had been theretofore arrested and detained by the police as a suspect in a robbery case. Upon Ford's request the hearing was continued until November 23, 1910. On November 22, 1910 Ford presented two municipal court warrants for Schubert - one for vagrancy and one for adultery. Ford turned one of these warrants over to another police officer and kept the other in his own possession. On November 23, 1910 Ford again produced Schubert in court in obedience to the writ of habeas corpus. When no identification of Schubert was made in connection with the robbery which he was suspected of having committed, Judge Hickman Deamian, before whom the hearing was had, inquired of Ford if he had any other charges against Schubert. Ford answered that he had not, by shaking his head in the negative. Thereupon an order was entered discharging Schubert, and with a copy of memorandum of the order he and his counsel went to the jail to have the jailer discharge him. Officer Ford preceded them to the jail and there proposed to arrest Schubert under one of the warrants he had sworn out in the municipal court the day before and which he had had in his possession ever since it was issued. Upon being remonstrated with by Schubert's counsel and told he was guilty of contempt of court in deceiving the court by his answers to the court's inquiries, he was induced to go with counsel for Schubert before the court, where counsel related what had occurred. In that case the Supreme court said at pp. 541, 542:

"The contempt of which plaintiff in error was adjudged

guilty was committed in the presence of and within the personal knowledge of the court. The complaint so charged and the judgment so recites fully and in detail. The judgment and order of the criminal court in part recites that the court asked plaintiff in error, who was standing within a few feet of him, if he had any other charges against Schubert; that plaintiff in error responded by shaking his head in the negative, meaning and intending the court to understand that he had no further charges or process against the prisoner under which he could or should be held; that the court so understood the action of plaintiff in error and acted accordingly, when, in fact, the latter had the day before caused two warrants to issue from the municipal court for the arrest of Schubert, - one for vagrancy and the other for living with a woman in a state of adultery, - and had one of the warrants in his possession when he made false answer to the court's inquiry, acting upon which the court discharged Schubert; that plaintiff in error a half hour later, when he appeared befor the court at the time Schubert's counsel complained of the intention and attempt of plaintiff in error to arrest Schubert under one or both warrants he had caused to be issued the day before, stated to the court that he had said warrants issued for the purpose of arresting Schubert after his discharge if the court discharged him in the habeas corpus proceeding, and that he would have arrested said Schubert had he not been prevented from doing so by Schubert's counsel. Conduct which tends to embarrass or obstruct the court in the administration of justice, or which tends to bring the administration of the law into disrespect or disregard, constitutes a direct contempt and is punishable as such. (Dahnke v. People, 168 Ill. 102.) The acts constituting the contempt having been committed in the presence of the court were a direct contempt, and the order of commitment could have been lawfully made without the preliminary proceedings that were had. Tolman v. Jones, 114 Ill. 147; State v. Frew, 24 W. Va. 416; People v. Greely, 12 How. Pr. 14; Neel v. State, 9 Ark. 529; 50 Am. Dec. 209; 9 Cyc. 19.)

Neither is there any merit in defendant's remaining contentions that the court erred in holding him in contempt, since the trial judge did not know of his own knowledge that his (Katelhut's) answers were false at the time they were made and that the judgment order was erroneous because it failed to show that his (Katelhut's) confession as to the falsity of his statements was not elicited from him on cross-examination at the same hearing and on the sane day when he made the false statements. The propositions advanced in these contentions are contfary to the established law of this state as is clearly shown in People v. Berof, 367 Ill. 454, wherein the court stated at pp. 456-7:

"The plaintiff in error attempts to argue that the present case is not one of direct contempt because, as he says, the court did not know at the time the false statements were made that they were false and that the court, therefore, had to depend on additional evidence heard at a later time. This is an effort to confuse the last part of Blackstone's rule with the first part of it. The case before us clearly falls within the first part

guilty was committed in the presence of and within the personal knowledge of the court. The complaint be charged and judgment so recites fully and in detail. The judgment and order of the criminal court in part recites that the court asked plaintiff in error, who was standing within a few feet of him, if he had any other charges against himself; that plaintiff in error responded by shaking his head in the negative, smiling and indicating the court to understand that he had no further charges or process against the prisoner under which he could or should be held; that the court so understood the action of plaintiff in error and acted accordingly, when, in fact, the latter had the day before caused two warrants to issue from the municipal court for the arrest of Kimbert, - one for vagrancy and the other for living with a woman in a state of adultery, - and had one of the warrants in his possession when he made false answer to the court's inquiry, acting upon which the court discharged Kimbert; that plaintiff in error a half hour later, when he appeared before the court at the time Kimbert's counsel complained of the intervention and attempt of plaintiff in error to arrest Kimbert under one or both warrants he had caused to be issued the day before, stated to the court that he had said warrants issued for the purpose of arresting Kimbert after his discharge if the court discharged him in the Fabens matter proceeding, and that he would have arrested said Kimbert had he not been prevented from doing so by Kimbert's counsel. Conduct which tends to embarrass or obstruct the court in the administration of justice, or which tends to bring the administration of the law into disrespect or disrepute, constitutes a direct contempt and is punishable as such. (Ex parte v. Fraser, 10 Ill. App. 102.) The acts constituting the contempt having been committed in the presence of the court were a direct contempt, and the order of commitment could have been lawfully made without the preliminary proceedings that were had. Folsom v. Spear, 112 Ill. 147; State v. Barr, 84 Va. 410; People v. Wright, 12 How. Pr. 14; Ex parte v. State, 9 Ark. 259; 20 Am. Dec. 207; 7 Ore. 19.)

Neither is there any merit in defendant's remaining contentions that the court erred in holding him in contempt, since the trial judge did not know of his own knowledge that his (Kimbert's) answers were false at the time they were made and that the judgment order was erroneous because it failed to show that his (Kimbert's) examination as to the reality of his statements was not elicited from him on cross-examination at the same hearing and on the same day when he made the false statements. The propositions advanced in these contentions are contrary to the established law of this state as is clearly shown in People v. Barrett, 367 Ill. 454, wherein the court stated at pp. 456-7:

"The plaintiff in error attempts to argue that the present case is not one of direct contempt because, as he says, the court did not know at the time the false statements were made that they were false and that the court, therefore, had to depend on additional evidence heard at a later time. This is an effort to confuse the last part of Dickenstone's role with the first part of it. The case before us clearly falls within the first part

of the rule in which the contempt is committed in the very face of the court. The judgment is based upon matters which took place in the presence of the court and of which the court had direct personal knowledge without the hearing of any extraneous evidence whatever. The fact that some days intervened between the making of the false statements and the admission of their falsity is of no importance. Both acts occurred in the presence of the court and were calculated, and of such a character, as to impede the administration of justice. Had they occurred at a different place, or had the admission of falsity been made at a different place, so that the judge would have to hear evidence on the matter, the second part of the rule would come into operation, but it has no application to the facts before us. *** Whether the court was misled or not, the effort was made, and the contempt was complete when the false statements were presented."

The defendant was guilty of a wilful and direct criminal contempt of an aggravated character, and the judgment order of the Municipal court of Chicago is therefore affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

of the rule in which the contempt is committed in the very face of the court. The judgment is held upon petitions which took place in the presence of the court and of which the court had direct personal knowledge without the hearing of any extraneous evidence whatever. The fact that some days intervened between the making of the false statements and the admission of their falsity is of no importance. Both acts occurred in the presence of the court and were calculated, and of such a character, as to impede the administration of justice. Had they occurred at a different place, or had the admission of falsity been made at a different place, so that the judge could have to hear evidence on the matter, the second part of the rule would come into operation, but it has no application to the facts before us. Whether the court was misled or not, the effort was made, and the contempt was complete when the false statements were presented."

The defendant was guilty of a willful and direct criminal contempt of an aggravated character, and the judgment order of the municipal court of Chicago is therefore affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A.D. 1944

General No. 9417

Agenda No. 1

322 I.A. 694

A. Claude Foreman,
Plaintiff-Appellant,

vs.

Harry C. Daniels,
Defendant-Appellee.

Appeal from
Circuit Court,
Pike County.

179

1943

DADY, P.J.

This is an action in replevin brought by plaintiff-appellant, Claude Foreman, to recover from defendant-appellee, Harry C. Daniels, the possession of certain cattle. The case was tried before the trial court without a jury. Judgment was entered against the plaintiff and in favor of the defendant. The plaintiff appeals.

On August 5, 1941, Foreman sued out the writ of replevin and by virtue thereof obtained possession of the cattle on the same day.

In June, 1933, one Norton was the owner and in possession of a farm and certain cattle thereon, and while Norton was such owner, Norton and Foreman entered into a written agreement, dated June 10, 1933, which in substance stated that: Norton "gives deed and title" to said farm to Foreman in payment of a note for $5,000 secured by real estate mortgage held by Foreman; Norton to have the privilege of redemption on or before September 1, 1934, provided he pays Foreman the $5,000 in addition to any other

Abstract

This is an action in replevin brought by plaintiff-appellant, Clyde Foreman, to recover from defendant-appellee, Harry O. Morton, the possession of certain cattle. The case was tried before the trial court without a jury. Judgment was entered against the plaintiff and in favor of the defendant. The plaintiff appeals.

On August 3, 1941, Foreman sign out the suit of replevin and by virtue thereof obtained possession of the cattle on the same day.

In June, 1932, one Morton was the owner and in possession of a farm and certain cattle thereon, and while Morton was such owner, Morton and Foreman entered into a written agreement, dated June 10, 1932, which in substance stated that: Morton "gives deed and title" to said farm to Foreman in payment of a note for $2,000 secured by real estate mortgage held by Foreman; Morton to have the privilege of redemption on or before September 1, 1934, provided he pays Foreman the $2,000 in addition to any other

expenses connected with the management of the farm and paid by Foreman; Foreman "acquires ownership" of one half interest in all personal property owned by Norton in full payment of a $650 note secured by a chattel mortgage held by Foreman; Norton to remain on the farm as tenant during the "time" of the agreement; the system of rental shall in general be a 50-50 proposition, and ownership of all personal property to be equal between the two parties; Norton to do all work in the care of the livestock * * * and tend * * * livestock in a manner consistent with good farm management.

The cattle in question were part of the personal property described in such written instrument, or the natural increase therefrom.

So far as the record shows no other instrument affecting the title, ownership, or right of possession, of the farm or cattle, was executed by either Norton or Foreman.

From the time of the execution of such instrument until after the transaction hereinafter referred to, Norton continued to reside on and have possession of the farm, and continued to have the actual possession of such cattle, all apparently by virtue of such written agreement. Foreman did not live on the farm.

Daniels was a cattle buyer who lived a few miles distant. On August 2, 1941, Daniels went to the Norton farm and bought the cattle from Norton for $1,230. He then gave Norton a check for $200 on account, the check being made payable to Norton. Foreman was not consulted about such sale. On August 4, 1941, Daniels sent one Gerard, who was in the trucking business, to get the cattle, giving Gerard $1,030 in cash to pay the balance of the purchase price. Thereafter, and on August 4, 1941, Gerard got the cattle from the Norton farm and hauled them to the Daniels farm. On getting the

expenses connected with the management of the farm and said by Foreman; Foreman "acquires ownership" of one half interest in all personal property owned by Norton in full payment of a $850 note secured by a chattel mortgage held by Foreman; Norton to remain on the farm as tenant during the "life" of the agreement; the system of rental shall in general be a 60-40 proposition, and ownership of all personal property to be equal between the two parties; Norton to do all work in the care of the livestock * * and tend * * livestock in a manner consistent with good farm management.

The cattle in question were part of the personal property described in such written instrument, or the natural increase therefrom.

So far as the record shows no other instrument affecting the title, ownership, or right of possession, of the farm or cattle, was executed by either Norton or Foreman.

From the time of the execution of such instrument until after the transaction hereinafter referred to, Norton continued to reside on and have possession of the farm, and continued to have the actual possession of such cattle, all apparently by virtue of such written agreement. Foreman did not live on the farm.

Daniels was a cattle buyer who lived a few miles distant. On August 4, 1941, Daniels went to the Norton farm and bought the cattle from Norton for $1,830. He then gave Norton a check for $830 on account, the check being made payable to Norton. Foreman was not consulted about such sale. On August 4, 1941, Daniels sent one Gerard, who was in the trucking business, to get the cattle, giving Gerard $1,050 in cash to pay the balance of the purchase price. Thereafter, and on August 4, 1941, Gerard got the cattle from the Norton farm and hauled them to the Daniels farm. On getting the

cattle Gerard, instead of paying cash, gave Norton two checks, both signed by Gerard, one for $415 payable to Norton, and the other for $615 payable to Foreman. Norton duly cashed his two checks. On August 4, 1941, Norton deposited the Foreman check for $615 in a local bank to the credit of Foreman. On August 4, 1941, Foreman was advised by the bank of the deposit having been made to his credit, and then for the first time learned of the sale. He refused to accept the credit from the bank, and thereafter, and on August 14, 1941, the bank deducted the credit from Foreman's account and sent the check back to Gerard.

Foreman testified that shortly before August 2, 1941, he and Norton talked of closing the partnership and disposing of the cattle and other personal property; that they agreed on a public sale and that Foreman should have the privilege of buying and keeping on the farm any cattle that he, Foreman, desired to keep. Foreman further testified that on prior occasions Norton had sold cattle and other livestock on the farm to persons other than Daniels, but only after he and Norton had decided on what was to be sold, and that he had told Norton that this bunch of cattle must stay on the farm.

Norton testified that he and Foreman owned the cattle "50-50," that whenever they had anything to sell he, Norton, sold it; that Foreman never told him he could not sell it; that he did not know whether anything was said about getting Foreman's consent, and that he and Foreman did talk of having an auction sale but never came to any agreement.

The only ruling on the admission or rejection of evidence complained of is that the trial court erroneously refused to admit in evidence the record of a judgment entered by confession in the circuit court on November 26, 1941, in favor of a bank and against

cattle Gerard, instead of paying cash, gave Norton two checks, both signed by Gerard, one for $615 payable to Norton, and the other for $615 payable to Foreman. Norton only cashed his two checks. On August 4, 1941, Norton deposited the Foreman check for $615 in a local bank to the credit of Foreman. On August 4, 1941, Foreman was advised by the bank of the deposit having been made to his credit, and then for the first time learned of the sale. He refused to accept the credit from the bank, and thereafter, and on August 14, 1941, the bank deducted the credit from Foreman's account and sent the check back to Gerard.

Foreman testified that shortly before August 3, 1941, he and Norton talked of closing the partnership and disposing of the cattle and other personal property; that they agreed on a public sale and that Foreman should have the privilege of buying and keeping on the farm any cattle that he, Foreman, desired to keep. Foreman further testified that on prior occasions Norton had sold cattle and other livestock on the farm to persons other than Lumsle, but only after he and Norton had decided on what was to be sold, and that he had told Norton that this bunch of cattle must stay on the farm.

Norton testified that he and Foreman owned the cattle "50-50," that whenever they had anything to sell he, Norton, sold it; that Foreman never told him he could not sell it; that he did not know whether anything was said about getting Foreman's consent, and that he and Foreman did talk of having an auction sale but never came to any agreement.

The only ruling on the admission or rejection of evidence complained of is that the trial court erroneously refused to admit in evidence the record of a judgment entered by confession in the circuit court on November 26, 1941, in favor of a bank and against

Norton and wife, for $1,763.08 on a judgment note payable to the bank. It is our opinion that objection was properly sustained to the offer of such evidence.

Several other alleged errors are argued, but they all go to the question of whether the plaintiff proved that he was entitled to the sole possession of the cattle in question at the time of the commencement of this suit, and therefore entitled to maintain this suit.

It is our opinion that there was ample evidence to justify the trial court in finding that the defendant had such an interest and right of possession in the cattle that the cattle could not be taken from the defendant by a replevin writ. Not only is this our conclusion, but, assuming as true all of the evidence most favorable to the plaintiff, and considering only such evidence, it is our opinion that such evidence merely shows or tends to show that Foreman and Norton each had an undivided interest in all of the cattle, and that when the cattle were sold Norton was in the actual possession thereof. It is not denied that by the sale Daniels acquired all of the rights and interests of Norton. Whether the relationship between Foreman and Norton was that of co-partners as distinguished from co-owners is not material and not necessary to a decision of this case. Under such circumstances as those appearing in this case a co-partner cannot maintain an action for replevin. (See Jackson v. Craw, 149 Ill. App. 559; Belcher v. VanDuzen, 37 Ill. 281; Carter v. Wright, 275 Ill. App. 224.) Nor can a joint owner maintain such an action. (Harris v. LeMasters, 215 Ill. App. 282.)

The judgment of the trial court is affirmed.

Affirmed.

Norton and wife, for $1,782.08 on a judgment note payable to the bank. It is our opinion that objection was properly sustained to the offer of such evidence.

Several other alleged errors are argued, but they all go to the question of whether the plaintiff proved that he was entitled to the sole possession of the cattle in question at the time of the commencement of this suit, and therefore entitled to maintain this suit.

It is our opinion that there was ample evidence to justify the trial court in finding that the defendant had such an interest and right of possession in the cattle that the cattle could not be taken from the defendant by a replevin writ. Not only is this our conclusion, but, assuming as true all of the evidence most favorable to the plaintiff, and considering only such evidence, it is our opinion that such evidence merely shows or tends to show that Frances and Norton each had an undivided interest in all of the cattle, and that when the cattle were sold Norton was in the actual possession thereof. It is not denied that by the sale Dunkle acquired all of the rights and interests of Norton. Whether the relationship between Frances and Norton was that of co-partners or distinguished from co-owners is not material and not necessary to a decision of this case. Under such circumstances as those appearing in this case a co-partner cannot maintain an action for replevin. (See Jackson v. Crew, 147 Ill. App. 520; Bulcher v. Vandman, 37 Ill. 401; Carter v. Wright, 275 Ill. App. 224.) Nor can a joint owner maintain such an action. (Durrie v. Lockstere, 215 Ill. App. 528.)

The judgment of the trial court is affirmed.

Affirmed.

42381

322 I.A. 695

CLARA M. RUSSELL,

Appellee,

v.

GEORGE ORTSEIFEN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

In a third amended verified statement of claim filed in the Municipal Court of Chicago it was alleged that the defendant was the owner of an apartment house at 5300 South Greenwood Avenue, Chicago, and that Reuben Schoenstadt and his wife (who were co-defendants at that time but who were subsequently dismissed) were the lawful tenants of an apartment on the second floor; that plaintiff was employed by the Schoenstadts as a maid and it then and there became the duty of either one or all of the defendants to keep this apartment in a good tenantable condition of repair and to provide the plaintiff with a safe place to work, but they negligently permitted it to be and remain out of repair and in a dangerous condition; that the defendants, the Schoenstadts, had knowledge of the untenantable and dangerous condition of the premises and particularly a window in the back bedroom which was in a dangerous condition in that the mechanical appliances which controlled said window so as to allow the plaintiff or anyone to safely raise or lower the same were in the state of disrepair and that the defendant, George Ortseifen, had knowledge thereof at the time the said premises were leased by the Schoenstadts or should have had notice thereof through Paul Hazard, his duly authorized agent; that the dangerous condition of the window was unknown to the plaintiff, who while in the exercise of all due care for her own safety attempted

42381

CLARA M. RUSSELL,

Appellee,

v.

GEORGE DETWILER,

Appellant.

MR. PRESIDING JUSTICE SCHOOL DELIVERED THE OPINION OF THE COURT.

In a third amended verified statement of claim filed in the Municipal Court of Chicago, it was alleged that the defendant was the owner of an apartment house at 4500 South Greenwood Avenue, Chicago, and that Joseph Schoenstedt and his wife (who were co-defendants at that time but who were subsequently dismissed) were the lawful tenants of an apartment on the second floor; that plaintiff was employed by the Schoenstedts as a maid and it then and there became the duty of either one or all of the defendants to keep this apartment in a good tenantable condition of repair and to provide the plaintiff with a safe place to work, but they negligently permitted it to be and remain out of repair and in a dangerous condition; that the defendants, the Schoenstedts, had knowledge of the untenantable and dangerous condition of the premises and particularly a window in the back bedroom which was in a dangerous condition in that the mechanical appliances which controlled said window so as to allow the plaintiff or anyone to safely raise or lower the same were in the state of disrepair and that the defendant, George Detwiler, had knowledge thereof at the time the said premises were leased by the Schoenstedts or should have had notice thereof through Paul Ekzard, his duly authorized agent; that the dangerous condition of the window was unknown to the plaintiff, who while in the exercise of all due care for her own safety attempted

to raise the window and it came down suddenly and without notice upon the hand of the plaintiff, injuring her.

A verified defense was filed by George Ortseifen, signed by his agent, to the amended statement of claim wherein he denied that he was the owner of the apartment house; admitted that the defendants, Schoenstadts, were the lawful tenants of the apartment they occupied on the second floor of the said premises and were in lawful possession thereof and that the plaintiff was employed by them as a maid. He denied that it was his duty to keep the apartment in good condition and repair and that there was any duty upon him to furnish the plaintiff with a safe place to work, and denied that he negligently permitted the apartment to be and remain out of repair and in a dangerous condition; he denied that he had knowledge of any defect or should have had any notice thereof and denied that Paul Hazard was his duly authorized agent. He further denied that the window in the back bedroom was in a dangerous condition, but on information and belief stated that, if any part thereof was in a state of disrepair, it was known to the plaintiff. He denied that at the time the plaintiff was injured, he in anywise operated or controlled the apartment.

Plaintiff testified that she was a housemaid of Mrs. Schoenstadt and resided with the family at their apartment at 5300 South Greenwood Avenue and that on October 5, 1940, she was told by Mrs. Schoenstadt to open the bedroom window and to do so she had to reach up to open the catch and before she could get her hand down, the upper sash wedged her hand between the two sashes, which caused an injury to her hand. On cross examination she said that on September 30, 1940, a man, Paul Rosa, was washing the

to raise the window and it came down suddenly and without notice upon the hand of the plaintiff, injuring her.

A verified defense was filed by Dwayne Schmeiten, signed by his agent, to the amended statement of claim wherein he denied that he was the owner of the apartment house; admitted that the defendants, Schmeiteds, were the lawful tenants of the apartment they occupied on the second floor of the said premises and were in lawful possession thereof and to the plaintiff was employed by them as a maid. He denied that it was his duty to keep the apartment in good condition and repair and that there was any duty upon him to furnish the plaintiff with a safe place to work, and denied that he negligently permitted the apartment to be and remain out of repair and in a dangerous condition; he denied that he had knowledge of any defect or should have had any notice thereof and denied that Paul Hazard was his duly authorized agent. He further denied that the window in the back bedroom was in a dangerous condition, but on information and belief stated that, if any part thereof was in a state of disrepair, it was known to the plaintiff. He denied that at the time the plaintiff was injured, he in anywise operated or controlled the apartment.

Plaintiff testified that she was a housemaid of Mrs. Schmeiteds and resided with the family at their apartment at 5300 South Greenwood Avenue and that on October 5, 1940, she was told by Mrs. Schmeiteds to open the bedroom window and to do so she had to reach up to open the catch and before she could get her hand down, the upper sash wedged her hand between the two sashes, which caused an injury to her hand. On cross examination she said that on September 20, 1940, a man, Paul Cox, was washing the

windows in the apartment and at the time she was informed by him that the window cord had broken. Later in the testimony she said she didn't know what was wrong with the window, just that there was something wrong with it and that she found that out from Mrs. Schoenstadt who told her there was something wrong with the window and that they had to be careful. Upon objection the witness was not permitted to say whether or not she had anything to do with the window between September 30th and October 5th, and upon further objection the witness was not permitted to testify whether she made any attempt to open the window at any time between September 30th and October 5th.

Mrs. Schoenstadt, who ostensibly was called by the plaintiff as an adverse witness, testified that for the past four years she and her husband lived at 5300 South Greenwood Avenue in an apartment located on the second floor and that Clara Russell was employed by her as a maid; that the premises were leased through the office of Paul H. Hazard & Company, who were the renting agents, but she did not know who the landlord was and had never met nor seen him; that on October 5, 1940, when the window was opened, it came down on Clara Russell's hand; that she had paid rent for the premises to Paul Hazard & Company, and, over the objection of the defendant, Ortseifen, and upon the promise of the plaintiff that they would show that Paul Hazard was the agent of George Ortseifen, the court reserved his ruling on the objection, stating, "Let it go in until you make a connection; if you do not, I will strike it out", and on that basis permitted the witness to relate a conversation with a Miss Hansen who the witness stated was the secretary to Paul Hazard. She stated that she talked with her on September 30, 1940, and told her that the window cords were broken and that someone might be hurt and at the present she had the window looked, and

windows in the apartment and at the time she was interested in him that the window cord had broken. Later in the testimony she said she didn't know what was wrong with the window, just that there was something wrong with it and that she found that out from Mrs. Schoenstadt who told her there was something wrong with the window and that they had to be careful. Upon objection the witness was not permitted to say whether or not she had anything to do with the window between September 30th and October 5th, and upon further objection the witness was not permitted to testify whether she made any attempt to open the window at any time between September 30th and October 5th.

Mrs. Schoenstadt, who reasonably was called by the plaintiff as an adverse witness, testified that for the past four years she and her husband lived at 5000 South Greenwood Avenue in an apartment located on the second floor and that Olive Russell was employed by her as a maid; that the premises were leased through the office of Paul H. Hazard & Company, who were the renting agents, but she did not know who the landlord was and had never met nor seen him; that on October 5, 1940, when the window was opened, it came down on Olive Russell's hand; that she had paid rent for the premises to Paul Hazard & Company, and, over the objection of the defendant, Orthwein, and upon the promise of the plaintiff that they would show that Paul Hazard was the agent of George Orthwein, the court reserved his ruling on the objection, stating, "Let it go in until you make a connection; if you do not, I will strike it out", and on that basis permitted the witness to relate a conversation with a Miss Hansen who the witness stated was the secretary to Paul Hazard. She stated that she talked with her on September 30, 1940, and told her that the window cords were broken and that someone might be hurt and at the present she had the window locked, and

that Miss Hansen told her it would be taken care of. After considerable prompting and over the defendant's objection, the witness was permitted to testify that she had had a conversation with Miss Hansen several weeks before September 30th in which conversation she told her that the window was weak; that when they raised the window it would slide down and then would stick, and Miss Hansen said that she would take care of it, and she had never talked to Miss Hansen about the window before that time; that she talked to the janitor on September 30, 1940, and told him that the window was broken and that he said it would be taken care of.

Reuben Schoenstadt, one of the co-defendants who had not as yet been formally dismissed from the suit, was called by the defendant, Ortseifen"under section 60" of the Practice Act and testified that he was one of the defendants and was the tenant of the second apartment of the premises located at 5300 South Greenwood Avenue and had entered that tenancy four years ago on May 1, 1938, and had a written lease on the premises, and that he made a new lease each year. He identified his signature at the bottom of the photostatic copy of the lease and testified that it was a true and correct copy of the lease that he had entered into for those premises on February 15, 1940; that it was a form lease and it was his signature and everything was there; that he knew nothing about the circumstances of the accident until after it had occurred. Defendant offered in evidence the photostatic copy, which was denied.

The amended statement of claim alleges that at the time the injuries were suffered by plaintiff, George Ortseifen was the owner of the premises and that the Schoenstadts were the tenants. In his answer Mr. Ortseifen denied that he was the owner of the premises. He admitted that the Schoenstadts were the lawful tenants of the premises. He also denied that it was his duty to keep the

that Miss Hansen told her it would be taken care of. After considerable prompting and over the defendant's objection, the witness was permitted to testify that she had had a conversation with Miss Hansen several weeks before September 30th in which conversation she told her that the window was weak; that when they raised the window it would slide down and then would stick, and Miss Hansen said that she would take care of it, and she had never talked to Miss Hansen about the window before that time; that she talked to the janitor on September 30, 1940, and told him that the window was broken and that he said it would be taken care of.

Reuben Schomstedt, one of the co-defendants who had not as yet been formally dismissed from the suit, was called by the defendant, Ortseifen "under section 20" of the practice act and testified that he was one of the defendants and was the tenant of the second apartment of the premises located at 8300 North Greenwood Avenue and had entered that tenancy four years ago on May 1, 1935, and had a written lease on the premises, and that he made a new lease each year. He identified his signature at the bottom of the photostatic copy of the lease and testified that it was a true and correct copy of the lease that he had entered into for those premises on February 15, 1940; that it was a form lease and it was his signature and everything was there; that he knew nothing about the circumstances of the accident until after it had occurred. Defendant offered in evidence the photostatic copy, which was denied.

The amended statement of claim alleges that at the time the injuries were suffered by plaintiff, George Ortseifen was the owner of the premises and that the Schomstedts were the tenants. In his answer Mr. Ortseifen denied that he was the owner of the premises. He admitted that the Schomstedts were the lawful tenants of the premises. He also denied that it was his duty to keep the

premises in good condition, or that there was any duty on him to furnish the plaintiff with a safe place to work, or that he negligently permitted the premises to be and remain out of repair. There was no proof that the defendant ever owned the premises, or that he entered into any lease with the Schoenstadts, or that he was responsible for the condition of the premises. He offered a photostatic copy of the lease. The court refused to receive this lease in evidence. The lease, dated February 15, 1940, was between the estate of Mary L. Ortseifen, by Paul A. Hazard & Co., Inc., agent, as lessor, and Reuben Schoenstadt as lessee, and was signed in that manner. It was not contended that this was not a true photostatic copy of the original lease. We are unable to understand how judgment could be entered against Mr. Ortseifen, when on the issue made by the pleadings as to whether he was the owner or the landlord, there was no proof introduced that he was either. In fact, the evidence tends to show that he was not the landlord.

The judgment of the Municipal Court of Chicago should be and is reversed and judgment is entered here for defendant and against plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT
HERE AGAINST PLAINTIFF FOR COSTS.

BURKE AND KILEY, JJ. CONCUR.

premises in good condition, or that there was any duty on him to furnish the plaintiff with a safe place to work, or that he negligently permitted the premises to be and remain out of repair. There was no proof that the defendant ever owned the premises, or that he entered into any lease with the Schoenstadts, or that he was responsible for the condition of the premises. He offered a photostatic copy of the lease. The court refused to receive this lease in evidence. The lease, dated February 15, 1940, was between the estate of Mary L. Ortseifen, by Paul A. Hexamer & Co., Inc., agent, as lessor, and Reuben Schoenstadt as lessee, and was signed in that manner. It was not contended that this was not a true photostatic copy of the original lease. We are unable to understand how judgment could be entered against Mr. Ortseifen, when on the issue made by the pleadings as to whether he was the owner or the landlord, there was no proof introduced that he was either. In fact, the evidence tends to show that he was not the landlord.

The judgment of the Municipal Court of Chicago should be and is reversed and judgment is entered here for defendant and against plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT HERE AGAINST PLAINTIFF FOR COSTS.

BURKE AND KILEY, JJ., CONCUR.

42606

322 I.A. 695

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
MICHAEL HEALY and WALTER O'BRIEN,
Plaintiffs in Error.

ERROR TO
CRIMINAL COURT
COOK COUNTY.

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

In an indictment returned to the Criminal Court of Cook County, Michael Healy and Walter O'Brien were charged in Count I with making a felonious assault upon Oakley Lester with intent to maim and disfigure him, on February 23, 1942; and in Counts II and III with conspiracy to do bodily harm to Oakley Lester. Defendants pleaded not guilty. There was a trial before the court and a jury. At the close of the People's case the State elected to proceed upon the second and third counts, which were the conspiracy counts. The first count, which was the mayhem count, was abandoned. Motions for a directed verdict at the close of the State's case, and again at the close of all the evidence, were denied. The jury returned a verdict of guilty as to each defendant, "of the crime of conspiracy" in manner and form as charged in the indictment. Motions for a new trial and in arrest of judgment were denied. The court entered judgment on the verdict and sentenced each defendant to imprisonment in the county jail for one year. Defendants, by this writ of error, seek reversal of the judgment.

The evidence shows that Oakley Lester, the prosecuting witness, was a whoesale meat jobber buying from packers and commission houses and selling to retailers. He was using a truck which carried the name of Kerber Packing Company on its panel and the name of Oakley Lester on the door as distributor. Lester is a distributor of some of Kerber Packing Company products. Lester buys meats from

42208

PEOPLE OF THE STATE OF ILLINOIS,
defendant in Error,

v.

MICHAEL HEALY and [illegible],
Plaintiffs in Error.

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

In an indictment returned to the Criminal Court of Cook County, Michael Healy and [illegible] were charged in Count I with making a felonious assault upon Oakley Lester with intent to maim and disfigure him, on February [illegible], 1924; and in Counts II and III with conspiracy to do bodily harm to Oakley Lester. Defendants pleaded not guilty. There was a trial before the court and a jury. At the close of the people's case the State elected to proceed upon the second and third counts, which were the conspiracy counts. The first count, which was the mayhem count, was abandoned. Motions for a directed verdict at the close of the State's case, and again at the close of all the evidence, were denied. The jury returned a verdict of guilty as to each defendant, "of the crime of conspiracy" in manner and form as charged in the indictment. Motions for a new trial and in arrest of judgment were denied. The court entered judgment on the verdict and sentenced each defendant to imprisonment in the county jail for one year. Defendants, by this writ of error, seek reversal of the judgment.

The evidence shows that Oakley Lester, the prosecuting witness, was a wholesale meat jobber buying from packers and commission houses and selling to retailers. He was using a truck which carried the name of Kerber Packing Company on its panel and the name of Oakley Lester on the door as distributor. Lester is a distributor of some of Kerber Packing Company products. Lester buys meats from

Swift, Armour, Rothschild and Charles Gunderson and sells them wholesale to small town butchers or retailers on the Northwest Highway from Crystal Lake to Elgin or Crystal Lake to Chicago. Lester was not a member of any union, but is his own employer. The defendants are members and business representatives of the Meat Drivers Union, Local 710, in which there are about 6500 members. They were elected to their positions about 1930. Healy is also president of the Central States Drivers Council which covers Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Kansas, Missouri, and a part of Kentucky. Healy is 42 years of age. He was born and educated in Chicago. At 17 he was in the World War, where he served honorably. He is married. Healy is a chairman of the Draft Board at 7955 South Ashland Avenue covering territory from 6400 south to 8100 south and from Halsted Street to the city limits. O'Brien is 49 years of age, married, with three children. He has lived all his life in Chicago. The defendants introduced testimony that they were men of character and standing in Chicago and that they had good reputations for being peaceful and law-abiding citizens in the community.

Washington's Birthday in 1942 fell on Sunday, and Monday, February 23rd was celebrated. There was a working agreement between employers and employees with Union Local 710 that no meat would be picked up or delivered on Monday, the celebrated holiday, except to hotels, railroads, hospitals and such like places. Armours, Swifts and such places were closed, and a number of wholesale meat places were closed on that day. Some were open, about half. Healy's territory covered from 26th Street on the south into Evanston on the north, and from Lake Michigan to Forest Park. O'Brien's territory covers the south side of Chicago. His duties required him to go to the Fulton Street district once a week to take care of grievances. Thursday was

Swift, Armour, Rothschild and Charles Dunderson and sells them wholesale to small town butchers or retailers on the Northwest dividing from Crystal Lake to Elgin or Crystal Lake to Ohio. Dunderson was not a member of any union, but is his own employer. The defendants are members and business representatives of the Milk Drivers Union, Local 710, in which there are about 6000 members. They were elected to their positions about 1930. Healy is also president of the Central States Drivers Council which covers Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Kansas, Missouri, and a part of Kentucky. Healy is 42 years of age. He was born and educated in Chicago. At 17 he was in the World War, where he served honorably. He is married. Healy is a chairman of the Draft Board at 7555 South Ashland Avenue covering territory from 6400 south to 8100 south and from Halsted Street to the city limits. O'Brien is 49 years of age, married, with three children. He has lived all his life in Chicago. The defendants introduced testimony that they were man of character and standing in Chicago and that they had good reputations for being peaceful and law-abiding citizens in the community.

Washington's Birthday in 1941 fell on Sunday, and Monday, February 23rd was celebrated. There was a working agreement between employers and employees with Union Local 710 that no meat would be picked up or delivered on Monday, the celebrated Holiday, except to hotels, railroads, hospitals and such like places. Armour, Swifts and such places were closed, and a number of wholesale meat places were closed on that day. Some were open, about half. Healy's territory covered from 26th Street on the south into Evanston on the north, and from Lake Michigan to Forest Park. O'Brien's territory covers the south side of Chicago. His duties required him to go to the Fulton Street district once a week to take care of grievances. Thursday was

his usual day to visit Fulton Street territory, but he visited there on other days. He goes to see men who have grievances and straightens their difficulties out. He was there on Monday the 23rd of February pursuant to his duties. The two defendants drove into the territory that morning in their autos and met at Sangamon andFulton Streets. They were accustomed to meet whenever O'Brien came into Healy's territory. Healy wore a top coat and glasses and O'Brien wore a top coat and glasses. The defendants were going up and down Fulton Street that morning for the purpose of seeing that the agreement that was entered into by the employers and the Local Union was lived up to, and that no member of the union violated the agreement by driving a truck or hauling any meats out of the Fulton Street area or into it. The defendants met between 8:30 and 9:00 o'clock that morning and walked Fulton Street until about 11:30 O'clock when Oakley Lester drove up in his truck to the wholesale meat establishment of Rothschild & Sons at 224 North Peoria Street. At that time defendants were standing at the corner of Peoria and Fulton Streets.

Lester drove his truck to Chicago. He was alone, dressed in his working clothes. It was a "rather cold" day and Lester wore what is called a freezer coat, a heavy woolen coat, and a white butcher coat over all. Lester is five feet eleven inches tall and weighs 204 pounds. Lester stopped at the business establishment of Rothschild & Sons to pick up an order of meat, and backed his truck up to Rothschild's place, where there are two big doors at the sidewalk and the shipping room inside those doors which were open at that time. Lester got off his truck and walked into the shipping room. Seeing Lester back up to the Rothschild's shipping room, defendants, who were nearby at the corner of Peoria Street, walked over to where Lester was.

The State made proof of the altercation in question by Oakley Lester, the prosecuting witness, and by Bernard Rothschild and

his usual day to visit Milton Street territory, but he visited there on other days. He went to see men who have gone to straightens their difficulties out. He was there on Monday the 23rd of February pursuant to his duties. The two defendants came into the territory that morning in their autos and met at Washington and Milton streets.

They were accustomed to meet wherever O'Brien came into Healy's territory. Healy wore a top coat and glasses and O'Brien wore a top coat and glasses. The defendants went north on Milton Street that morning for the purpose of seeing that the agreement that was entered into by the employers and the local union was lived up to, and that no member of the union violated the agreement by driving a truck or hauling any meats out of the Milton Street area or into it. The defendants met between 8:30 and 9:00 o'clock that morning and walked Milton Street until about 11:00 O'clock when Healy Lester drove up in his truck to the wholesale meat establishment of Cohenhild & Sons at 224 North Peoria Street. At that time defendants were standing at the corner of Peoria and Milton Streets.

Lester drove his truck to Dickey. He was alone, dressed in his working clothes. It was a "rather cold" day and he had on what is called a freezer coat, a heavy woolen coat, and a white duster coat over all. Lester is five feet eleven inches tall and weighs 204 pounds. Lester stopped at the business establishment of Cohenhild & Sons to pick up an order of meat, and backed his truck up to Cohenhild's place, where there are two big doors at the sidewalk and the shipping room inside these doors which were open at that time. Lester got off his truck and walked into the shipping room. Seeing Lester back up to the Cohenhild's shipping room, defendants, who were nearby at the corner of Peoria Street, walked over to where Lester was.

The State made proof of the altercation in question by Healy Lester, the prosecuting witness, and by Leonard Cohenhild and

Philip Rothschild, the two Rothschild sons. Max Rothschild, the father, and also an employee of the company named Pietrand, were present at the altercation but were not produced as witnesses by the State. By Oakley Lester, the prosecuting witness, it was shown that as he walked into the Rothschild shipping room Healy and O'Brien walked in and that they said to him that he was not taking any meat out of the place and that he replied, "Why not? Have the Japs got this country?" That Max Rothschild came out of the office and the defendants told him that if they gave Lester any meat they would close up his place. Lester says he then walked out and stood there waiting for the defendants to settle the argument with Max Rothschild; that he stayed there a minute or two when defendants came out and started talking to him and told him that if he took out any meat from Rothschild's that day they would close up the Kerber Packing Company which is located about two miles south of Elgin; that he told defendants that Kerber did not mean a thing to him and that he said to defendants, "You bastards don't mean anything to me", and with that he started to walk away when he was struck on the jaw over his left shoulder; that fists were hitting him in the face; that he was dazed by the blow; that his head started to clear and he went for the one in front of him and started swinging at O'Brien; that Mr. Rothschild came out and the fight stopped; and that O'Brien went out in the middle of the street and so did Healy. There the fight stopped.

Lester's lower left jaw was broken and his nose was fractured slightly. He was given first aid at the office of Dr. Carl Stevens on Van Buren Street and drove back to Elgin where his jaw was set in the Sherman Hospital. Lester testified that both O'Brien and Healy were wearing glasses there that morning; that the fight did not last more than a minute and that he was swinging and punching away; that he did not remember contacting any one when he was swinging his fists.

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Lester's lower left jaw was broken and his nose was fractured slightly. He was given first aid at the office of Dr. Carl Stevens on Van Buren Street and drove back to Elgin where his jaw was set in the Sherman Hospital. Lester testified that both O'Brien and Healy were wearing glasses there that morning; that the fight did not last more than a minute and that he was swinging and ducking away; that he did not remember contacting any one when he was swinging his fists.

Bernard Rothschild testified that he was thirty years of age and employed by Rothschild & Sons Company at 224 North Peoria Street. He was in the office at the time the fight started. He testified that the building faces east on the west side of Peoria Street; that the shipping room, in size about 30 x 40 feet, opens onto the sidewalk by swinging doors and is open all the time during business hours regardless of temperature; that the office is in the northeast corner overlooking the sidewalk and also overlooking the shipping room; and that the cooler is to the rear of the shipping room; that the office is glass partitioned off from the shipping room on the inside; that the meats were not in the shipping room, just the scales where they weigh out the meats; that the office takes up the north side of the shipping room which is glass enclosed, or partitioned with glass on top and wood underneath extending up about two and a half or three feet and above that is glass; that there is a window in the east part of the office; and that the door leading from the shipping room into the office is about ten or fifteen feet west of the entrance to the shipping room.

He said that he was in the office at the time and what he saw and heard was through the glass partition between the office and shipping room and through the glass in the door to the office. He said that Lester came into the shipping room and said hello and at that time the defendants came into the shipping room and said that Lester would not be able to get any meat out of their place that day; that Lester wanted to know how come and said, "Since when is this country being run by the Japs?"; that after that remark they were arguing; that he could not hear what they were saying; that the three men left the shipping room and walked to the sidewalk. He said all three men were standing at the entrance to the shipping room; that Lester was facing east and the defendants were facing him, one

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He said that he was in the office at the time and what he saw and heard was through the glass partition between the office and shipping room and through the glass in the door to the office. He said that Lester came into the shipping room and said hello and at that time the defendants came into the shipping room and said that Lester would not be able to get any meat out of their place that day; that Lester wanted to know how come and said, "Since when is this country being run by the Jews?"; that after that remark they were arguing; that he could not hear what they were saying; that the three men left the shipping room and walked to the sidewalk. He said all three men were standing at the entrance to the shipping room; that Lester was facing east and the defendants were facing him, one

on each side; that Lester had his back to the door (entrance) which was open; that they stood there arguing two or three minutes; that he could not hear what they were talking about; that you can hear through the partitions but cannot distinguish very much of what is said; that he had distinctly heard Lester say, "Are you fellows running the country or are the Japs running the country?"; that Lester wanted to know since when was this country being taken over by the Japs; that that was said in the shipping room and he, the witness, was then in the office; that the door between the office and the shipping room was then closed. He said the men stood there all talking naturally with their hand down at the time; that Lester's back was to the witness; that he kept watching them and was paying attention to what was going on. The witness says, "The next thing I knew I saw some fists flying around"; then he saw the defendants fighting with Lester, both of them swinging; that Lester was hit and went into a crouching position, got up on his feet, and swung at O'Brien who went into the street; that Healy went north to the next place of business and picked up a scale weight; that he saw Lester striking at O'Brien and Healy after he was hit but did not see him hit anyone; that Lester swung at O'Brien with one hand; that O'Brien backed away and ran into the middle of the street. He did not hear Lester call defendants any names although he was listening and watching everything that was taking place.

Philip Rothschild, another of the Rothschild sons, twenty-six years of age, testified for the State; he said that at the time Lester, O'Brien and Healy came into the shipping room that he, his brother Bernard, and his father, Max Rothschild, were in the office with the door closed; that the office door opens into the shipping room; that neither of them were doing anything at the time; that the cashier was working on the books. Another employee, Peitrand, he thought was on the elevator. He says Lester drove up and backed up to the place; that Lester got out of the truck and O'Brien and Healy walked over to

on each side; that Lester had his back to the door (entrance) which was open; that they stood there during two or three minutes; that he could not hear what they were talking about; that you can hear through the partitions but cannot distinguish too much of what is said; that he had distinctly heard Lester say, "Are you fellows running the country or are the dago running the country"; that Lester wanted to know since when was this country being taken over by the dago; that that was said in the adjoining room and by the witness, was then in the office; that the door between the office and the adjoining room was then closed. He said the men stood there all talking naturally with their hand down at the time; that Lester's back was to the witness; that he kept watching them and was paying attention to what was going on. The witness says, "The next thing I knew I saw some fists flying around"; then he saw the defendants fighting with Lester, both of them swinging; that Lester was hit and went into a crouching position, got up on his feet, and swung at O'Brien who went into the street; that Healy went north to the next door of business and picked up a scale weight; that he saw Lester striking at O'Brien and Healy after he was hit but did not see him hit anyone; that Lester swung at O'Brien with one hand; that O'Brien backed away and ran into the middle of the street. He did not hear Lester call defendants any names although he was listening and watching everything that was taking place.

Philip Gotbaoild, another of the Gotbaoild sons, twenty-six years of age, testified for the State; he said that at the time Lester, O'Brien and Healy came into the adjoining room that he, his brother Bernard, and his father, Max Gotbaoild, were in the office with the door closed; that the office door opens into the adjoining room; that neither of them were doing anything at the time; that the cashier was working on the books. Another employee, Kennard, he thought was on the elevator. He says Lester drove up and hooked up to the place; that Lester got out of the truck and O'Brien and Healy walked over to

him; that, being in the office, he could only hear parts of the conversation; that defendants told Lester he could not take any meat out that day; that Lester asked why but he did not hear the reply or reason given; that the door to the glass enclosed office was shut; that Healy called from the shipping room and told them that Lester could not take any meat out that day and that then Lester wanted to know if the Japs had taken over the country; that he heard Lester say, "Are the Japs running the country?" and that Lester then walked into the place of business and walked right out; that Lester was arguing with Healy and O'Brien as he walked in and out; that Lester, O'Brien and Healy stood there arguing at the door; that Lester was leaning up against the doorway of the place of business; that Lester's back was towards him facing the street; that he could not see his hands; that the next thing he saw was "some fists flying"; that he saw some blows and that O'Brien hit Lester and that Healy hit Lester about the same time with their fists; that he saw Lester swing at Healy and O'Brien once; that he could not say if Lester hit anyone; that he then ran out to stop the fight and when he got out tried to stop it; that when he got out they were separated far apart; Lester was about ten feet north of the doorway, O'Brien was out in the street and Healy was coming up with an iron weight in his hand. There the fight stopped.

Dr. Kenneth P. Johnston testified that upon examination of Lester's nose it could not be told if there was an injury to the bone but the X-ray disclosed a fracture of the nasal bone and that the distal portion of the bone was slightly in from its normal position; slightly depressed; the X-ray also disclosed a fracture of the lower left jawbone, anterior to the angle of the jaw; the break was completely through the bone; that there were some abrasions on the forehead and left side of the head; that there were bruises present and the eyes were black. Lester was in the hospital for five days, having the jaw repaired.

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Lester drove to Elgin after the fight. He was given first aid on Van Buren Street at an industrial doctor's office.

The defendant Healy testified that the defendants were in the territory in question going up and down Fulton Market on the 23rd day of February for the sole purpose of seeing that the agreement between the employers of members of their union, and the union, with reference to not working on Washington's Birthday, except for emergency deliveries, was observed; that they saw Lester back up to the Rothschild place and they went over and introduced themselves and informed him of the union agreement; that Lester said it made no difference to him and said, "What? Are you Japs running the country?"; that he (the witness) then went and spoke to Max Rothschild, the father, and reminded him of the agreement; that Lester followed him in; that they then walked out and there Lester became profane and hit O'Brien and knocked him down; that he grabbed Lester and five or six blows were exchanged between them and that he was hit twice; that he had no idea how many times he struck Lester; that he did not strike the first blow; that both were swinging; and that he only knew of Lester's injuries from what he had been told.

Walter O'Brien testified that he was in the territory in question on that day pursuant to his duties as an agent of his union; that he saw Lester backing his truck up in front of Rothschild's place and with Healy he went to where Lester was; that Healy introduced himself and the witness to Lester and asked if Lester knew of the working agreement and Lester said it made no difference to him, that he was going to take out some stuff; that Healy then told Max Rothschild not to give Lester any stuff; that he and Healy then walked out of the shipping room; that there Lester called them some dirty names and when he turned to look at Lester he was hit by Lester and that he was knocked down; that Healy and Lester started to fight and that Lester

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hit Healy and Healy hit Lester; that he did not know how many blows were struck; that it started just like that (snapping fingers) and it was all over in a minute.

Louis Tomaso testified on behalf of defendants that he was at the southwest corner of Fulton and Peoria Streets; that he saw O'Brien come out of the Rothschild place as if pushed out; that O'Brien was hit and went down; that Healy and Lester started to fight and exchanged five or six blows; that the Rothschilds ran out and the fight stopped.

Defendants urge that the State's evidence does not show a conspiracy. We agree with this contention. While the three men stood arguing over a point affecting the relations of employers and employees, Mr. Lester became exasperated and called names. The names called were such as would normally cause men to become excited. It was not unnatural that the defendants resented the name calling. The defendants were on the premises on a lawful mission. It is apparent that the ensuing assault was not made by prior arrangement but arose on the spur of the moment. The spontaneous nature of the fight negatives the charge of conspiracy.

Our view is that under the evidence the court should have directed a verdict for the defendants.

Defendants complain of the giving of an instruction at the request of the People and of the refusal to give an instruction on behalf of the defendants. Defendants also maintain that their proven good character is convincing proof of their innocence. The points made in this court were urged in the trial court.

In view of our finding that it was the duty of the court to direct a verdict for the defendants it will be unnecessary to extend this opinion by discussing the last mentioned points.

Because of the views expressed the judgment of the Criminal Court of Cook County is reversed.

JUDGMENT REVERSED.

BURKE AND KILEY, JJ. CONCUR.

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| CITY OF CHICAGO, a Municipal Corporation, Appellee, v. JACOB M. ROTH, Appellant. | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

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MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

On October 7, 1941, in the Municipal Court of Chicago, two complaints were filed against Jacob M. Roth, charging him with disorderly conduct and willful assault. He was tried by the court and a jury, found guilty, and fined $100 on each complaint. On November 25, 1941, motions for a new trial and in arrest of judgment were overruled, and judgments were entered on the verdict.

In each case an appeal was prayed and allowed, and on December 12, 1941 appeal bonds were approved and filed. No appeals were ever perfected from these judgments. On November 30, 1942, about a year after judgment, defendant filed a petition pursuant to section 21 of the Municipal Court Act and Rule 69-3 of the Municipal Court of Chicago, seeking to vacate the judgment entered on November 25, 1941, on the ground that plaintiff, City of Chicago, was represented at the trial of the cause by M. N. Andalman, an attorney who is not a member of the City's law department. No written answer to the petition was filed by plaintiff. The court heard arguments of counsel and on December 16, 1942 an order was entered denying the defendant's petition to vacate the judgment. This appeal followed.

The record clearly shows that the trial judge in the original case knew that Mr. Andalman was not a regular member of the City's law department. Nevertheless the trial judge permitted Mr. Andalman

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CITY OF CHICAGO, a Municipal Corporation,

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v.

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Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE MCGURN delivered the opinion of the court.

On October 7, 1941, in the Municipal Court of Chicago, two complaints were filed against Jacob M. Roth, charging him with disorderly conduct and willful assault. He was tried by the court and a jury, found guilty, and fined $100 on each complaint. On November 24, 1941, motions for a new trial and in arrest of judgment were overruled, and judgment were entered on the verdict.

In each case an appeal was prayed and allowed, and on December 12, 1941 appeal bonds were approved and filed. No appeals were ever perfected from these judgments. On November 10, 1942, almost a year after judgment, defendant filed a petition purporting to section 21 of the Municipal Court Act and Rule 68-3 of the Municipal Court of Chicago, seeking to vacate the judgment entered on November 20, 1941, on the ground that plaintiff, City of Chicago, was represented at the trial of the cause by M. F. Anderson, an attorney who is not a member of the City's law department. No written answer to the petition was filed by plaintiff. The court heard arguments of counsel and on December 16, 1942 an order was entered denying the defendant's motion to vacate the judgment. This appeal follows.

The record clearly shows that the trial judge in the original case knew that Mr. Anderson was not a regular member of the City's law department. Nevertheless the trial judge permitted Mr. Anderson

to represent the City in the prosecution of the case. If this was error it was an error of law. The procedure provided for by section 21 of the Municipal Court Act and Rule 69 of that court is substantially the same as the procedure provided for by Section 72 of the Civil Practice Act. Section 72 abolishes the writ of error coram nobis, and provides for the correction by written motion of all errors in fact, committed in the proceedings of any court of record and which, by the common law, could have been corrected by said writ. The purpose of the writ of error coram nobis under the common law practice as now provided by Section 72 of the Civil Practice Act, is that such writs should only be used where an error of fact occurred at the trial, of which the court had no knowledge, and which evidence could not be produced by the defendant, either through duress, ignorance or excusable mistake.

The record in this case does not show any error of fact. A motion in the nature of a writ of error coram nobis may not be used as a substitute for an appeal. A dissenter is not permitted to review an error of law by a motion in the nature of a writ of error coram nobis.

Our Supreme Court discussed this subject in the recent case of Jerome v. 5019 Quincy Street Building Corporation, 385 Ill. ~~App.~~ 524.

Defendant points out that the petition is the commencement of a new suit. This is true. He urges that to the petition should be filed some pleading. The failure of the plaintiff to answer the petition admitted only the facts well pleaded. The petition nowhere alleges that the court was unaware of the fact that Mr. Andalman was not the regular City prosecutor. It alleges that petitioner was ignorant of that fact. The report of proceedings describes Mr. Andalman's presence as being in the capacity of Acting Assistant Corporation Counsel. It is apparent that the argument of the City in

to represent the City in the prosecution of the case. If this was error it was an error of law. The procedure provided for by section 21 of the Municipal Court Act and Rule 20 of that court is substantially the same as the procedure provided for by Section 72 of the Civil Practice Act. Section 72 abolishes the writ of error coram nobis, and provides for the correction by written motion of all errors in fact, committed in the proceedings of any court of record and which, by the common law, might have been corrected by said writ. The purpose of the writ of error coram nobis under the common law practice as now provided by Section 72 of the Civil Practice Act, is that such writs should only be used where an error of fact occurred at the trial, of which the court had no knowledge, and which evidence could not be produced by the defendant, either through duress, ignorance or excusable mistake.

The record in this case does not show any error of fact. A motion in the nature of a writ of error coram nobis may not be used as a substitute for an appeal. A disagreement is not permitted to review an error of law by a motion in the nature of a writ of error coram nobis.

Our Supreme Court discussed this subject in the recent case of Jerome v. Bull, Minor Street Building Corporation, 340 Ill. 384.

Defendant points out that the petition is the commencement of a new suit. This is true. We argue that to the petition should be filed some pleading. The failure of the plaintiff to answer the petition admitted only the facts well alleged. The petition however alleges that the court was unaware of the fact that Mr. Andaiman was not the regular City prosecutor. It alleges that petitioner was ignorant of that fact. The report of proceedings describes Mr. Andaiman's presence as being in the capacity of Acting Assistant Corporation Counsel. It is apparent that the argument of the City in

opposing the petition was in effect a motion to dismiss the petition.

The court was right in dismissing the petition.

The order of the Municipal Court denying defendant's petition to vacate the judgments is affirmed.

ORDER AFFIRMED.

BURKE AND KILEY, JJ. CONCUR.

opposing the petition was in effect a motion to dismiss the petition.

The court was right in dismissing the petition.

The order of the municipal court overruling defendant's petition to vacate the judgments is affirmed.

BURKE AND KILEY, JJ., CONCUR.

OTHER AFFIRMED.

42890

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|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ERROR TO |
| Defendant in Error, | COUNTY COURT |
| v. | COOK COUNTY. |
| O. C. MOE, | Hon. Albert E. Isley, |
| Plaintiff in Error. | Trial Judge. |

148

322 I.A. 696

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

It appears from the statements made in the brief submitted by counsel for plaintiff in error that O. C. Moe was informed against in the County Court of Cook County in an information consisting of five counts charging him with violation of Section 24, Chapter 91 of the Revised Statutes of Illinois, known and designated as the Medical Practice Act.

Defendant makes the following statements concerning the language of the information:

That Count 1 alleged an offense in the language of the statute using the disjunctive, alleging that he

"did then and there diagnose the supposed ailments of Loraine Johnson, also known as Eleanor Nelson, as pressure on base of her head, spine and on the stomach nerves."

That Count 2 alleged in the language of the statute in the disjunctive that the plaintiff in error

"did then and there treat the supposed pressure on the base of the head, spine, and on the stomach nerves of Loraine Johnson, also known as Eleanor Nelson, by applying pressure to, and by manipulating, her diaphragm, spine, right shoulder and neck with his fingers and hands; and by twisting her head with his hands; and by applying heat from an electric machine to her back and chest."

That Count 3 is alleged in the language of the statute using the disjunctive and then, after the videlicit to-wit, alleges the violation in the following manner:

"did then and there suggest, recommend and prescribe the application of pressure to, and the manipulation of, the diaphragm, spine, right shoulder and neck of Loraine Johnson, also known as Eleanor Nelson, with his fingers and hands; and the application of heat from an electric machine to her back and chest, with the intention of receiving a fee of $3.00 in cash therefor."

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|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | |
| Defendant in Error, | |
| v. | |
| C. S. [illegible], | |
| Plaintiff in Error. | |

Mr. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

It appears from the statements made in the brief submitted by counsel for plaintiff in error that a. C. was informed against in the County Court of Cook County in an information containing six counts charging his with violation of Section 24, Chapter 91 of the Revised Statutes of Illinois, known and designated as the Medical Practice Act.

Defendant made the following statements concerning the language of the information:

That Count 1 alleged an attempt in the language of the statute using the disjunctive, alleging that he

"did then and there diagnose the suspected ailments of Lorine Johnson, also known as Lenore Nelson, on pretense on base of her head, spine and on the stomach nerve."

That Count 2 alleged in the language of the statute in the disjunctive that the plaintiff in error

"did then and there treat the suspected ailments on the base of the head, spine, and on the stomach nerve of Lorine Johnson, also known as Lenore Nelson, by applying pressure to, and by manipulating, her diaphragm, spine, right shoulder and neck with his fingers and hands; and by twisting her head with his hands; and by applying heat from an electric machine to her back and chest."

That Count 3 is alleged in the language of the statute using the disjunctive and then after the statutory to-wit, alleges the violation in the following manner:

"did then and there suggest, recommend and prescribe the application of pressure to, and the manipulation of, the diaphragm, spine, right shoulder and neck of Lorine Johnson, also known as Lenore Nelson, with his fingers and hands; and the application of heat from an electric machine to her back and chest, with the intention of receiving a fee of $2.00 in cash therefor."

That Count 4, after reciting the language of the statute in the disjunctive following the videlicit to-wit, alleges an offense in the following manner:

"did then and there cause his name to appear on a professional business card in the following manner, to-wit: 'O. C. Moe, Chiropractor'; and caused his name to appear on the door at the entrance to a building located at 3138 Armitage Avenue, Chicago, Illinois, in the following manner, to wit: 'O. C. Moe, Chiropractor'."

That Count 5 alleges that the plaintiff in error,

"did then and there unlawfully maintain an office for the examination and treatment of persons afflicted and alleged and supposed to be afflicted with any ailment at 3138 Armitage Avenue, Chicago, Illinois, equipped with a Chiropractor's table and a neurocalometer."

Defendant sets forth that the following occurred at the trial of the case:

A motion to quash was filed and overruled.

On the trial of the issues a jury was impanelled consisting of twelve citizens, four of whom were women. A challenge was filed to the jury array, which challenge was denied.

A verdict finding the defendant guilty as charged in the information was returned by the jury.

A motion for a new trial was overruled.

Upon the verdict the plaintiff in error was fined in the sum of $300 and ninety days in the County Jail.

Our attention is called to certain instructions given by the court and objected to by plaintiff in error, particularly to an instruction of the court defining the term 'chiropractic' and an instruction refused over the objection of the plaintiff in error which asked the court to instruct the jury that the laws of the State of Illinois do not define or specify what constitutes the practice of medicine or the treatment of human ailments.

It was also stated by defendant's counsel that the State's attorney in his argument to the jury made many improper and inflammable remarks, which he says were not justified by the evidence presented in the cause.

That Count 6, after quoting the language of the statute in the disjunctive following the word "or", alleges an offense in the following manner:

"did then and there cause the name to appear on a commercial business card in the following manner, to-wit: 'D. O. Ill. Chiropractor'; and caused the same to appear on the door of the entrance to a building located at 2136 Southport Avenue, Chicago, Illinois, in the following manner, to wit: 'D. O. Ill. Chiropractor'."

That Count 8 alleges that the defendant did aver,

"did then and there unlawfully maintain an office for the examination and treatment of persons afflicted and ailing and advertised to be afflicted with and ailment at 2136 Southport Avenue, Chicago, Illinois, engaged with a chiropractor, being and a chiropractor."

Defendant sets forth that the following occurred at the trial of the case:

A motion to quash was filed and overruled.

On the trial of the issues a jury was duly impaneled consisting of twelve citizens, four of whom were women. Evidence was filed to the jury after which evidence was waived.

A verdict finding the defendant guilty as charged in the information was returned by the jury.

A motion for a new trial was overruled.

Upon the verdict the plaintiff in error was fined in the sum of $300 and ninety days in the county jail.

Our attention is called to certain instructions given by the court and objected to by plaintiff in error, particularly to an instruction of the court defining the term "chiropractic" and an instruction refused over the objection of the plaintiff in error which asked the court to instruct the jury that a law of the State of Illinois do not define or recognize what constitutes the practice of medicine or the treatment of human ailments.

It was also argued by defendant's counsel that the state's attorney in his argument to the jury made many improper and inflammatory remarks, which he alleged had not justified by the evidence presented in the cause.

On the trial of this cause Loraine Johnson testified that she was an investigator for the Department of Registration and Education and was assigned by Mr. Meadel to call on O. C. Moe, defendant, of 3138 Armitage Avenue on the 26th day of November, 1941. She went to the defendant's office on the second floor at that address and presented him with one of his cards (People's Exhibit 1) and then had a conversation with him. He asked her where she obtained the card and she told him it was given to her by a friend. He further asked her whether she had any treatment by chiropractors before and she told him no. She gave him her name as Eleanor Nelson, 4333 North Avers Avenue and gave her age as 42 years. She then entered a room and put on a gown. The defendant then put her on a chiropractic table and worked on her body. She testified that he manipulated her diaphragm and around the shoulders with his hands and that he then put a heating pad under her back and placed a weight of some sort on top of the diaphragm, which was left there for a few minutes. He told her it was to relieve the muscles and take out some of the tightness in there. He then had her change the gown and turn the opening to the back instead of the front and return to the table. He told her that she must have had an injury and dislocated vertebrae; that it must have been of long standing and was a very serious injury. He demonstrated the positions of the vertebrae on a skeleton. He advised her not to drink so much coffee. She further testified that she paid him $3.00 and that there were two rooms in the office - - one had a desk and chair and the other a chiropractic table and an electric machine.

People's Exhibit 2 reproduced in the abstract, was signed by Philip M. Harman, Superintendent of Registration and is a certificate "that the records of this Department do not show that Olaf C. Moe holds a license under the Illinois Medical Practice Act for the treatment of human ailments by any method or system", and is dated the 10th day of December, 1941.

On the trial of this issue Dorothea Dawson testified that she was an investigator for the Department of Conservation and Education and was assigned by Mr. Martin to talk to Mrs. G. Moe, defendant, of 2135 Armitage Avenue on the 20th day of December, 1941. She went to the defendant's office on the second floor at that address and presented his wife one of his cards (People's Exhibit 1) and then had a conversation with him. He asked her where she obtained the card and she told him it was given to her by a friend. He further asked her whether she had any literature by Christian Science before and she told him no. She gave his age as fifteen years, 4633 North Ivers Avenue and gave her age as 21 years. She then entered a room and sat on a sofa. The defendant took out her on a chiropractic table and worked on her back. He testified that he manipulated her diaphragm and around the sacrum with his hands and that he then put a heating pad under her back and placed a weight of some sort on top of the diaphragm, which she left there for a few minutes. He told her it was to relieve the muscles and take out some of the tightness in them. He then had her change the room and turn the opening to the back instead of the front and return to the table. He told her that she must have had an injury and sustained vertebrae; that it must have been a long standing and was a very serious injury. He demonstrated the positions of the vertebrae on a skeleton. He advised her not to drink to much coffee. The witness testified that she paid him $2.00 but that there were two rooms in the office -- one had a desk and chairs and the other a chiropractic table and an electric heater.

People's Exhibit 2 mentioned in the indictment, was signed by Philip H. Hansen, Superintendent of Registration and is a certificate "that the records of this Department do not show that Olaf E. Moe holds a license under the Illinois Medical Practice Act for the treatment of human ailments by any method or system", and is dated the 10th day of December, 1941.

It is argued for the defendant that none of the counts set forth any specific act; that each count is merely alleged in the language of the statute except there is an occasional attempt to state therein, some specific act which the People contend constitutes a crime; that the manner in which the allegations are set out in various counts of the information is ambiguous and furnishes the plaintiff in error with no reason for prosecution. The case of People v. Brown, 336 Ill. 257, was cited at great length in this connection, but this court considers the facts in that case to be different from those in the case at bar. The case of People v. Shaver, 367 Ill. 339, is also cited by defendant to show that the court should have quashed the information, but an examination of the information does not disclose the failure to set forth specific acts with certainty which was there discussed. People v. Shaver, 367 Ill. 339, cites the case of Blemer v. People, 76 Ill. 265, and the court in discussing the latter case remarked: "We held that the words 'game', 'device', etc., alluded directly to and were qualified by the words 'use of cards', and were intended to describe, in different words, the same thing; and that, when the word 'or' in a statute is used in the sense of 'to-wit' -- that is, in explanation of what procedes, and making it signify the same thing -- an indictment is well framed which adopts the words of the statute. As a corrollary, it is obvious that when an information after disjunctive allegations, reduces them to a specific charge by the use of a videlicet, or otherwise, it is sufficiently definite to charge a violation of the law and to inform the defendant of the nature of the charge against him. We have repeatedly held that an indictment or information is sufficient if it is specific enough to notify the accused of the charge he is to meet and to enable him to prepare his defense. (People v. Green, 362 Ill. 171; People v. Westerdahl, 316 id. 86; People v. Love, 310 id. 558). The information was, therefore, sufficient."

It is argued for the defendant that none of the counts set forth any specific act; that each count is merely alleged in the language of the statute except that there is an additional element in state therein, more specific but which the Court's charge constitutes a crime; that the manner in which the allegations are set out in various counts of the information is so lacking as to frustrate the plaintiff in error with no reason for prosecution. The case of People v. Brown, 207 Ill. 327, was cited as point lacking in this connection, but this court distinguishes the facts in that case to be different from those in the case at bar. The case of People v. Shaver, 327 Ill. 324, is also cited by defendant to show that the court should have quashed the information, and on consideration of the information then does not disclose the failure to set forth specific acts with certainty which was there discovered. People v. Shaver, 327 Ill. 329, cites the case of Ellmer v. People, 70 Ill. 405, and the court in discussing the latter case remarked: "It will be seen that the words 'counsel', 'advice', etc., alleged directly to be not within contemplated by the words 'use of cards', and were intended to describe, in different words, the same thing; and that, when the word 'or' in a statute is used in the sense of 'to-wit' — that is, in explanation of what precedes, and making it signify the same thing — an indictment in that phrase which adopts the words of the statute. In a correlative, it is obvious that when an information after disjunctive allegations, reduces them to a specific charge by the use of a vinculum, or otherwise, it is sufficiently definite to charge a violation of the law and to inform the defendant of the nature of the charge against him. We have repeatedly held that an indictment or information is sufficient if it is specific enough to notify the accused of the charge so as to test and to enable him to prepare his defense. (People v. Brown, 207 Ill. 177; People v. Vanderpool, 72 Ill. 82; People v. Lowe, 70 Ill. 529).

The information was, therefore, sufficient."

The language in the information in People v. Shaver, 367 Ill. 339, and that of the information in the instant case are practically identical.

Defendant also alleges that the court erred in denying the challenge to the jury array, contending that his rights are prejudiced by the inclusion of women on the jury, notwithstanding the statute passed by the Legislature of this state. This contention is made in the face of the fact that the act in question has been declared valid and not in violation of the Constitution. The points here raised by the defendant in attacking the validity and constitutionality of this Act have been reviewed and determined by the Illinois Supreme Court. People v. Traeger, 372 Ill. 11; People v. Ladwig, 365 Ill. 574; And in People v. Frankowski, 368 Ill. 171, the court said:

"We will take jurisdiction where a statute is attacked on grounds not previously urged, but this does not mean that if counsel suggests a new argument in support of an old ground of attack we must entertain the case. People v. Ladwig, 365 Ill. 574, 576."

Thus the constitutionality of the Medical Practice Act of 1923 has been definitely determined.

Defendant next avers that the court erred in permitting immaterial and incompetent testimony to be introduced, and that the introduction of "Exhibit 2" on behalf of the People violated the plaintiff in error's constitutional rights. This court does not find the exhibit prejudicial. Defendant's burden to produce a proper license is clearly indicated by the decision of the Supreme Court of Illinois in People v. Frankowsky, 371 Ill. 493, where it was said: "Where the question of due license to practice a certain profession arises in a penal action for violation of a statute, the burden of proving a proper license rests upon the defendant. Kettles v. People, 221 Ill. 221; Abhau v. Grassie, 262 id. 626."

The language in the interpretation in People v. Turner, 277 Ill. 326, and that of the interpretation in the instant case are practically identical.

Defendant also alleges that the court erred in denying the challenge to the jury array, contending that his rights are prejudiced by the inclusion of women on the jury, contributing the statute passed by the Legislature of this state. This contention is made in the face of the fact that the act in question has been declared valid and not in violation of the Constitution. The courts have relied by the determination in attacking the validity and constitutionality of this Act have been reviewed and determined by the Illinois Supreme Court. People v. Traeger, 274 Ill. 11; People v. Lundy, 340 Ill. 274; and in People v. Trombowski, 320 Ill. 171, the court held:

"We will take jurisdiction where a statute is attacked on grounds not previously urged, but this does not mean that if counsel encounter a new argument in support of an old ground of attack we must entertain the case. People v. Lundy, 338 Ill. 274, 277."

Thus the constitutionality of the Illinois statutes Act of 1922 has been definitely determined.

Defendant next avers that the court erred in permitting immaterial and incompetent testimony to be introduced, and that the introduction of "Exhibit 2" on behalf of the People violated the plaintiff in error's constitutional rights. This court does not find the exhibit prejudicial. Defendant's person to produce a proper license is clearly indicated by the decision of the Supreme Court of Illinois in People v. Trombowski, 274 Ill. 400, where it was held: "Where the question of the license to operate a certain profession arises in a penal action for violation of a statute, the burden of proving a proper license rests upon the defendant. Kettler v. People, 241 Ill. 521; Cohen v. People, 201 Ill. 346."

Although defendant states that the court gave improper instructions on behalf of the People he does not state nor are we able to find wherein any impropriety is to be found in them to support his position. A lengthy citation again from the case of People v. Brown, 336 Ill. 257, fails to reveal that the Supreme Court there discussed the subjects covered by the instructions given. "Practicing medicine" was not a charge contained in the information. However, the term "treatment of human ailments", is contained in other given instructions and this term, contrary to the refused instruction, is defined by Statute.

Defendant complains that the State's attorney made improper and prejudicial remarks in his argument to the jury, and cites the case of Angelo v. The People, 96 Ill. 209. In that case the prosecuting attorney referred to the fact that plaintiff in error was not placed on the stand as a witness, as "one reason why he should be convicted". Such was not the situation we are considering. In People v. Bonham, 348 Ill. 592, the Supreme Court said: "It is not improper for a State's attorney to reflect unfavorably on a defendant or to indulge in invective within thelimits of propriety if based on the evidence in the record.

The defendant further objected to the prosecutor stating to the jury, "No license has been produced". In People v. Paderewski, 373 Ill. 199, the Supreme Court said:

"The remarks of the State's Attorney complained of did not refer to or comment upon the failure of the defendant to testify, but were to the effect that if the defendant had a license of any kind to practice medicine he should produce it. The burden of proving a license is on the defendant in such cases. (People v. Frankowski, 371 Ill. 493). There was no error in the State's Attorney telling the jury, in substance, that the People did not have to establish that the defendant had no license to practice medicine."

Defendant also complains that the court should have permitted the complaining witness to answer the following question: "Your department does not regulate massage and manipulation or massage parlors, does it?" The objection was properly sustained as the question was immaterial to the issues of the case before the court.

Although defendant states that the court gave improper instructions on behalf of the People he does not state wherein he is able to find wherein any improprieties in so by found in them to support his position. A further citation upon fine his case of People v. Brown, 325 Ill. 227, fails to reveal that the instructions there discussed the subjects covered by the instructions given. "Practicing medicine" was not a charge contained in the information. However, the term "treatment of human ailments", as contained in other given instructions and this term, contrary to the refused instruction, is defined by statute.

Defendant complains that the State's attorney made improper and prejudicial remarks in his argument to the jury, and cites the case of Angelo v. The People, 95 Ill. 290. In that case the prosecuting attorney referred to the fact that plaintiff in error was not placed on the stand as a witness, as "are reasons why he should be convicted". Such was not the situation we are considering. In People v. Thomas, 345 Ill. 392, the Supreme Court said: "It is not improper for a State's attorney to reflect adversely on a defendant or to indulge in invective within the limits of propriety if based on the evidence in the record.

The defendant further objected to the prosecutor stating to the jury, "No license has been produced". In People v. Gutowski, 373 Ill. 109, the Supreme Court said:

> "The remarks of the State's Attorney complained of did not refer to or comment upon the failure of the defendant to testify, but were to the effect that if the defendant had a license of any kind to practice medicine he should produce it, the burden of proving a license is on the defendant in such cases. (People v. Gutowski, 373 Ill. 108). There was no error in the State's Attorney telling the jury, in substance, that the People did not have to establish that the defendant had no license to practice medicine."

Defendant also complains that the court should have permitted the complaining witness to answer the following question: "Your department does not regulate massage and manipulation as massage parlors, does it?" The objection was properly sustained as the question was immaterial to the issues of the case before the court.

We find no variance in the allegations and the evidence introduced, nor do we find that any error has been committed in the trial of the case. The verdict and the final judgment being in accord with the law and the evidence the court did not err in refusing the motion for a new trial and denying the motion in arrest of judgment, and for the reasons given the judgment of the County Court is affirmed.

AFFIRMED.

BURKE AND KILEY, JJ. CONCUR.

We find no evidence in the application and the evidence introduced, nor do we find that any error has been committed in the trial of the case. The verdict and the final judgment being in accord with the law and the evidence the court did not err in refusing the motion for a new trial and sustaining the motion in arrest of judgment, and for the reasons given the judgment of the County Court is affirmed.

AFFIRMED.

BURKE AND RILEY, JJ., concur.

42772

322 I.A. 697

FARA F. KAPLAN, (William Wallace McCallum, Assignee),

Plaintiff - Appellee,

v.

STEVENS HOTEL CORPORATION,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

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MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a complaint filed in the Superior Court of Cook County by Fara F. Kaplan against the Stevens Hotel Corporation she alleged that she was a tenant at the hotel; that she fell in one of the lobbies and broke her arm; that her fall was due to the negligence of defendant in that a "certain portion of the carpet then and there upon the floor of said lobby entrance was negligently, dangerously, wrongfully and unlawfully turned back upon a certain rubber mat". A trial before the court and a jury resulted in a verdict in favor of plaintiff in the sum of $15,000. Motions for a directed verdict made at the close of plaintiff's case and again at the close of all the evidence, for judgment non obstante veredicto and in the alternative for a new trial, were overruled. The trial judge required a remittitur of $5,000 and judgment was entered for $10,000. After the return of the verdict and before the court ruled on the motion for a new trial, plaintiff assigned her judgment to her attorney, William Wallace McCallum. For convenience, we will speak of Fara F. Kaplan as the plaintiff. Defendant appeals.

The Stevens Hotel is located on the west side of Michigan Avenue in Chicago and runs from 7th Street on the north to 8th Street on the south. The accident happened about 7:00 p.m. on Monday, November 10, 1941 at the north end of the 7th Street corridor, which leads from the 7th Street entrance south to the main lobby. Mrs. Kaplan had been a tenant in the hotel since 1937, occupying an apartment

FANA M. KAPLAN, (William Wallace McCallum, Assignee),

Plaintiff - Appellee,

v.

STEVENS HOTEL CORPORATION,

Defendant - Appellant.

Mr. JUSTICE ROBES DELIVERED THE OPINION OF THE COURT.

In a complaint filed in the Superior Court of Cook County by Fana M. Kaplan against the Stevens Hotel Corporation she alleged that she was a tenant at the hotel; that she fell in one of the lobbies and broke her arm; that her fall was due to the negligence of defendant in that a "certain portion of the carpet then and there upon the floor of said lobby entrance was negligently, carelessly, wrongfully and unlawfully turned back upon a certain rubber mat". A trial before the court and a jury resulted in a verdict in favor of plaintiff in the sum of $15,000. Motions for a directed verdict made at the close of plaintiff's case and again at the close of all the evidence, for judgment non obstante veredicto and in the alternative for a new trial, were overruled. The trial judge remitted a remittitur of $5,000 and judgment was entered for $10,000. After the return of the verdict and before the court ruled on the motion for a new trial, plaintiff assigned her judgment to her attorney, William Wallace McCallum. For convenience, we will speak of Fana M. Kaplan as the plaintiff. Defendant appeals.

The Stevens Hotel is located on the west side of Michigan Avenue in Chicago and runs from 7th Street on the north to 8th Street on the south. The accident happened about 7:00 p.m. on Monday, November 10, 1941 at the north end of the 7th Street corridor, which leads from the 7th Street entrance south to the main lobby. Mrs. Kaplan had been a tenant in the hotel since 1927, occupying an apartment

on the 19th floor. Mrs. Hazel Wade and her daughter, Mrs. Emily Weimerskirch, also resided in the hotel. That evening they happened to meet for dinner at Harding's Restaurant located on Wabash Avenue south of Madison Street. After dinner they walked east to Michigan Avenue and south to the hotel, intending to enter from the 7th Street door. Mrs. Wade testified that with her daughter and plaintiff she entered at 7th Street through the revolving door. A doorman was stationed on the outside and bell boys were in attendance in and about the lobby. The place where plaintiff fell was 12 or 15 feet from the revolving door. Witness testified further that she stumbled at about the same time as plaintiff at about the center of the runner, or rug, which ran the length of the corridor to the cigar stand; that there was a storm mat inside the revolving door with a space of about 5 inches between this mat and the end of the carpet; that the carpet was not fastened down; that she imagined it was about 1½ or 2 inches high; that she used that entrance that morning; that at that time she noticed there was an abrupt step of an inch to an inch and a half at the north edge of the rug; that normally that part of the rug sloped down gradually to the floor; that the mat was out from under the carpet a short ways, which held the rug off the floor; that a mat was underneath the rugs all over the hotel to "soften" them on the marble floors; that she had lived in the hotel over five years; that the rug she spoke of had been down for some months and was always down except during conventions; that it was always soft and felt like it was padded; that at the end of the rug there was a rubber and beveled down to the marble floor; that the foyer was always well lighted and was that way at the time of the accident; that during her residence in the hotel she used the 7th Street entrance twice a day; that she looked at the carpet before plaintiff fell but said nothing to her; that she looked at the rug immediately after plaintiff fell and could see the padding

on the 12th floor. Mrs. Hazel Gale and her daughter, Mrs. Betty Wimmerskirch, also resided in the hotel. That evening they proceeded to meet for dinner at Martinelli's restaurant located on Tenth Avenue south of Madison Street. After dinner they walked east to Eighteen Avenue and south to the hotel, intending to enter from the 7th Street door. Mrs. Wade testifies that with her daughter and plaintiff she entered at 7th Street through the revolving door. A doorman was stationed on the outside and bell boys were in attendance in and about the lobby. The place where plaintiff fell was 12 or 14 feet from the revolving door. Witness testified further that she standing at about the same time as plaintiff at about the center of the runner, or rug, which ran the length of the corridor to the elevators; that there was a storm mat inside the revolving door with a space of about 5 inches between this mat and the end of the runner; that the runner was not fastened down; that she imagined it was about 1½ or 2 inches high; that she used that entrance that morning; that at that time she noticed there was an abrupt rise of an inch to an inch and a half at the north edge of the rug; that normally that part of the rug sloped down gradually to the floor; that the mat was out from under the carpet a short way, which held the rug off the floor; that a mat was underneath the rugs all over the hotel in "section" rugs on the marble floors; that she had lived in the hotel over fifty years; that the rug the edge of had been down for some months and was always down except during conventions; that it was always soft and felt like it was padded; that at the end of the rug there was a rubber and beveled down to the marble floor; that the foyer was always well lighted and was that way at the time of the accident; that during her residence in the hotel she used the 7th Street entrance twice a day; that she looked at the carpet before plaintiff fell but said nothing to her; that she looked at the rug immediately after plaintiff fell and could see the padding

protruding an inch; that the only difference she saw between that night and any other time was that the padding protruded an inch; that when plaintiff fell she stumbled and pitched forward entirely to the floor, falling on her right side and arm; that while plaintiff remained on the floor a stranger and a bell boy came to her assistance; that the bell boy summoned Mr. Walsh, one of defendant's assistant managers; that Mr. Walsh reached the plaintiff within 2 or 3 minutes while she was still on the floor; that no change occurred in the position or appearance of the rug in the interval separating plaintiff's fall and the arrival of Mr. Walsh; that the protrusion of the ozite pad was present when plaintiff fell and afterwards, just as they had been when seen by witness in the forenoon of that day; that hundreds of people had passed through the corridor and over this position of the rug during the course of the day; that while witness could see the padding protruding an inch, that condition was not readily visible on account of the thickness, color and arrangement of the storm mat and rug; and that one had to be directly over the place to see its condition.

Mrs. Weimerskirch testified that she was with her mother and plaintiff at the time of the accident; that the three were walking abreast; that her mother tripped first and started to say something about having tripped over the rug and that witness turned around to look at her and just at that time Mrs. Kaplan went down; that witness noticed that the pad was protruding from the end of the rug; that the rug was held up by the pad and wrinkled, the wrinkles running across the rug north and south; that she was familiar with the lobby and rug, having used the entrance many times; that there was an ozite pad under the rug, which was sticking out; that she did not see either of the women trip and of her own knowledge did not know what caused it; that after plaintiff fell her feet were on the rubber mat 2 or 3 feet north of the south end of the rubber mat, the length of her knees to

protruding an inch; that the only difference she saw between that night and any other time was that the padding measured an inch; that when plaintiff fell she stumbled and pitched forward entirely to the floor, falling on her right side and arm; that while plaintiff remained on the floor a stranger and a bell boy came to her assistance; that the bell boy summoned Mr. Walsh, one of Innwood's assistant managers; that Mr. Walsh reached the plaintiff within 2 or 3 minutes while she was still on the floor; that no comment occurred in the position or appearance of the rug in the interval separating plaintiff's fall and the arrival of Mr. Walsh; that the observation of the waite pad was present when plaintiff fell and afterwards, just as they had been when seen by witness in the forenoon of that day; that hundreds of people had passed through the corridor and over this position of the rug during the course of the day; that within minutes could see the padding protruding an inch, that condition was not readily visible on account of the thickness, color and arrangement of the storm mat and rug; and that one had to be directly over the place to see the condition.

Mrs. Wismerhirsch testified that she was with her mother and plaintiff at the time of the accident; that the three were walking abreast; that her mother tripped first and started to say something about having tripped over the rug and that attorney turned around to look at her and just at that time Mrs. Hogan went down; that witness noticed that the pad was protruding from the end of the rug; that the rug was held up by the pad and wrinkled, the wrinkles running across the rug north and south; that she was familiar with the lobby and rug, having used the entrance many times; that there was an extra pad under the rug, which was sticking out; that she did not see either of the women trip and of her own knowledge did not know what caused it; that after plaintiff fell her feet were on the rubber mat 2 or 3 feet north of the south end of the rubber mat, the length of her shoes to

her feet; that the "rear end of her body" was on the edge of the rug; that there was a space of marble flooring about a foot wide between the mat and the carpet; that there were several ripples all the way across the carpet; that the lighting was the same as shown in the photograph in evidence; that she rushed over to help plaintiff and that shortly afterward a stranger and a bell boy came to give assistance; that immediate inspection of the rug disclosed that the north end was not fastened down, the pad was protruding from under the end of the rug and there were ripples along the edge of the pad; that in those particulars the rug was not in the same condition as it had been on previous days. Plaintiff testified substantially the same as the other two witnesses, describing the rubber mat, the heavy carpet and the space of marble flooring; that she did not see anything unusual and that as her foot touched the edge of the rug she fell and landed on the floor and then saw that the padding was sticking out under the edge of the rug and that the rug itself was somewhat in waves across the corridor; that she had been looking at the rug as it lay ahead of her but did not see anything unusual in its appearance; that after she fell she looked at the edge of the rug and saw that the darker padding was pulled out beyond the edge of the rug so as to make an elevation higher than normal; that there were waves in the rug extending across from east to west, and that these observations were made while plaintiff was in a sitting position after the accident. Witness, who was 46 years of age at the time of the accident, sustained a severe fracture to the radius of the right arm, suffered great pain and was confined in the Illinois Central Hospital for 7 days. She was then removed to the Michael Reese Hospital, where she came under the professional care of Dr. Levinthal. There was evidence that the day following her admission to that hospital she was given a general anesthetic; that Dr. Levinthal performed an operation on her arm; that after the effects of the anesthetic passed away her arm was very

her feet; that the "rear one of her body" was on the edge of the rug; that there was a space of marble flooring about 1 foot wide between the mat and the carpet; that there were several plaids all the way across the carpet; that the lighting was the same as shown in the photograph in evidence; that she walked over to help plaintiff and that shortly afterward a stenogra- and a full bar came to give assistance; that immediate inspection of the rug disclosed that the mat and was not fastened down, the mat was continuing from under the end of the rug and there were ripples along the edge of the rug; that in those particulars the rug was not in the same condition as it had been on previous days. Plaintiff testified substantially the same as the other two witnesses, describing the rubber mat, the heavy carpet and the space of marble flooring; that she did not see anything unusual and that as her foot touched the edge of the rug she fell and landed on the floor and then saw that the padding was sticking out under the edge of the rug and that the rug itself was somewhat in waves across the corridor; that she had been looking at the rug as it lay ahead of her but did not see anything unusual in its appearance; that after she fell she looked at the edge of the rug and saw that the heavier padding was pulled out around the edge of the rug so as to make an elevation higher than normal; that there were waves in the rug extending across from east to west, and that these observations were made while plaintiff was in a sitting position after the accident. Witness, who was 46 years of age at the time of the accident, sustained a severe fracture to the radius of the right arm, suffered great pain and was confined in the Illinois Central Hospital for 7 days. She was then removed to the Michael Reese Hospital, where she came under the professional care of Dr. Levinthal. There was evidence that the day following her admission to that hospital she was given a general anesthetic; that Dr. Levinthal performed an operation on her arm; that after the effects of the anesthetic passed away her arm was very

painful; that it was placed in a position of semi-flexion and heavy dressings and bandages were applied; that she remained in that hospital for 9 days; that after leaving the hospital she continued under Dr. Levinthal's care until about July, 1942; that to effect maximum restoration of function in the arm physiotheraphy was instituted immediately following the operation; that she was given pieces of wire and rubber sponge to work with, and both heat and light and massage treatments were employed in endeavoring to improve the condition of her injured arm; that at the time of the trial there was a great deal of numbness and restriction in the motion of the arm; that there was numbness in four or five of the fingers of the right hand and the elbow was always painful; that she noticed she could not fully extend her arm and that it could not be fully rotated; that there was numbness, pain and lack of strength in the arm; that the arm appeared smaller than before the accident and that there was a scar about 2½ inches long just below the elbow; and that since her last visit to Dr. Levinthal she was giving herself heat treatments. Dr. Alfred J. Mitchell, an orthopedic surgeon, testified that he examined plaintiff on December 2, 1942; that he found a scar 2½ inches long on the outer surface of the upper end of the right forearm; that tests for positive motion in the elbow joint showed a restriction in extension limited to within 15 degrees of normal; restriction in flexion about 5 degrees; a restriction in the range on turning the arm inward of 15 degrees and on turning the arm outward a restriction in motion of 35 degrees. X-ray examination of these bones of the arm showed that the head of the radius was missing and there had been a deposit of lime salts over the upper portion of the bone where the head of the radius had been. Dr. Mitchell stated that normally the radius was a bone which with other bones formed one of the three joints of the elbow, but now after the fracture it played no part

painful; that it was placed in a position of semi-flexion and heavy dressings and bandages were applied; that she remained in that position for 9 days; that after leaving the hospital she continued under Dr. Levinthal's care until about July, 1917; that an slight restoration of function in the arm occurred and manifested immediately following the operation; that she was given classes of wire and rubber bands to work with, and massage and light and massage treatments were employed in endeavoring to improve the condition of her injured arm; that at the time of the trial there was a great deal of numbness and restriction in the motion of the arm; that there was numbness in four or five of the fingers of the right hand and the elbow was always painful; that she noticed she could not fully extend her arm and that it would not be fully rotated; that there was numbness, pain and lack of strength in the arm; that the arm appeared smaller than before the accident and that there was a scar about 2½ inches long just below the elbow; and that since her last visit to Dr. Levinthal she was giving herself that treatments.

Dr. Alfred J. Mitchell, an orthopedic surgeon, testified that he examined plaintiff on December 5, 1917; that he found a scar 3½ inches long on the outer surface of the upper end of the right forearm; that tests for positive motion in the elbow joint showed a restriction in extension limited to within 15 degrees of normal; restriction in flexion about 5 degrees; a restriction in the power in turning the arm inward of 15 degrees and in turning the arm outward a restriction in motion of 35 degrees. X-ray examination of these bones of the arm showed that the head of the radius was missing and there had been a deposit of lime salts over the upper portion of the bone where the head of the radius had been. Dr. Mitchell stated that normally the radius was a bone which with other bones formed one of the three joints of the elbow, but now after the fracture it played no part

in the function of plaintiff's elbow. He stated that the head of the radius had been knocked off and displaced from its normal position. Mrs. Kaplan proved up payment of $58.75 for one hospital bill, $178.30 for another hospital bill and $400 to Dr. Levinthal. Dr. Levinthal did not testify. Plaintiff endeavored to subpoena him, but was not successful in serving the subpoena.

A. M. Rothbart, a witness called by defendant, testified that he was a court reporter; that he took down in shorthand a statement made by Mrs. Wade; that Mrs. Wade stated that she was about two steps ahead of plaintiff at the time of the accident; that there was "about 5 inches of bare floor between the rug and the mat"; that she turned around to speak to plaintiff and saw her down on the floor, and that previous to that did not notice that she had fallen. This witness further testified that 7 days after the accident he took a statement from plaintiff in which she said she was not looking down at the floor as she was walking, did not notice the rug until her toe struck it, and did not examine the rug afterward; that she had been in and out of that place a thousand times and had been in and out of there earlier the same day, and that she could not remember whether or not the mat was down. James Manly, head houseman at the hotel, testified that he was employed there continuously from April, 1927 until the Army took over in August, 1942; that it was his duty to look over the furnishings, rugs etc.; that the rugs were taken up, cleaned and replaced about every four months, including the rug in question, and that that rug had been down three weeks to a month before the accident occurred and had not been removed at any time; that when last laid, prior to the accident, there was an ozite pad under it about 4 inches shorter than the rug at each end; that across the end of each of the long rugs there was a piece of rubber which would lie flat on the marble and hold the rug down; that he inspected each of

in the function of plaintiff's office. He stated that the base of the radius had been knocked off and displaced from its normal position. Mrs. Kaplan proved up payment of $31.75 for one hospital bill, $178.50 for another hospital bill and $[illegible] to Dr. Levinthal. Dr. Levinthal did not testify. Plaintiff endeavored to subpoena him, but was not successful in serving the subpoena.

A. M. Cobbert, a witness called by defendant, testified that he was a court reporter; that he took down in shorthand a statement made by Mrs. Wade; that Mrs. Wade stated that she was about two steps ahead of plaintiff at the time of the accident; that there was "about 3 inches of bare floor between the rug and the wall"; that she turned around to speak to plaintiff and saw her down on the floor, and that previous to that she had not noticed that the rug tripped. This witness further testified that 7 days after the accident he took a statement from plaintiff in which she said she was not looking down at the floor as she was walking, did not notice the rug until her toe struck it, and did not examine the rug afterward; that she had been in and out of that place a thousand times and had been in and out of there earlier the same day, and that she could not remember whether or not the mat was down. James Kelly, head bookman at the hotel, testified that he was employed there continuously from April, 1927 until the Army took over in August, 1944; that it was his duty to look over the furnishings, rugs etc.; that the rugs were taken up, cleaned and replaced about every four months, including the rug in question, and that that rug had been down three weeks to a month before the accident occurred and had not been removed at any time; that when last laid, prior to the accident, there was an extra mat under it about 4 inches shorter than the rug at each end; that across the end of each of the long rugs there was a piece of rubber which would lie flat on the marble and hold the rug down; that he inspected each of

the rugs at least once a day and did so on November 10, 1941, including the rug mentioned as being involved in the accident; that this rug was 30 feet long and 8 feet wide and weighed 700 to 800 pounds; that it took 8 men to carry the rug when it was taken up or laid down and that it was so heavy it could not be scuffed up or wrinkled; that the rug was laid with the north end right up against the rubber storm mat and had no bare floor between; that neither on November 10, 1941, nor at any other time, did he ever see any ozite pad extending beyond the rug and that there was never at any time any space between the north end of the rug and the rubber mat. John McGivern testified that he worked at the hotel from 1937 until the Army took over; that he worked as a houseman, moving furniture, laying rugs etc., and was familiar with the rug and often laid it; that he put it down when it was new and thinks it was never laid without his being there to help; that it took 8 to 10 men to handle that rug; that first the ozite pad would be laid down, sufficiently far from the rubber mat, so that the rug would join up to the rubber mat and would be rolled right back and stretched out at the same time; that there was always a rubber border on each end of the rug to keep it from slipping or sliding; that the rug extended 4 to 6 inches beyond the ozite pad at each end, and that at no time prior to November 10, 1941 was the ozite padding ever exposed. Clifford Peters testified that he was night supervisor at the hotel at the time of the accident, and worked there nearly 5 years; that it was his duty to supervise the night work, inspect furniture, rugs etc., and to see that everything was clean and in good order; that he inspected the north end of the rug on Monday, November 10, 1941; that it was perfectly in position and no ozite padding exposed; and that the north end of the rug was against the rubber pad and there were no ripples or waves in it.

Defendant, relying on the rule that plaintiff can recover

the rugs at least once a day and did so on November 10, 1941, including the rug mentioned as being involved in the accident; that this rug was 30 feet long and 8 feet wide and weighed 700 to 800 pounds; that it took 8 men to carry the rug when it was taken up or laid down and that it was so heavy it could not be moved as an ordinary rug; that the rug was laid with the north end right up against the rubber storm mat and had no bare floor between; that on November 10, 1941, nor at any other time, did he ever see any cuts and extending beyond the rug and that there was never at any time any space between the north end of the rug and the rubber mat. Good witness testified that he worked at the hotel from 1927 until the hotel was sold over; that he worked as a housemen, moving furniture, laying rugs etc., and was familiar with the rug and often laid it; that he put it down when it was new and thinks it was never laid without his being there to help; that it took 8 to 10 men to handle that rug; that first the entire pad would be laid down, sufficiently far away from the rubber mat, so that the rug would join up to the rubber mat and would be rolled right back and stretched out at the same time; that there was always a rubber border on each end of the rug to keep it from slipping or sliding; that the rug extended 4 to 6 inches beyond the entire pad at each end, and that at no time prior to November 10, 1941 was the entire padding ever exposed. Officers witness testified that he was night supervisor at the hotel at the time of the accident, and worked there nearly 5 years; that it was his duty to supervise the night work, inspect furniture, rugs etc., and to see that everything was clean and in good order; that he inspected the north end of the rug on Monday, November 10, 1941; that it was perfectly in position and no entire padding exposed; and that the north end of the rug was against the rubber pad and there were no ripples or waves in it.

The defendant, relying on the rule that plaintiff can recover

only on the proof of the negligence charged in the complaint, states that there is no evidence tending to prove the averments charged in the complaint, and asserts that it cannot find in the record any testimony that the rug was "turned back upon a certain rubber mat" as alleged in the complaint. Defendant maintains that the testimony most favorable to the plaintiff was that the ozite pad stuck out an inch beyond the rug and that there were some ripples in the rug. Defendant also urges that this was a clear variance and failure of proof and that the court erred in refusing to direct a verdict for the defendant. Defendant recognizes the rule that a mere variance is waived unless objection is made in the trial court and an opportunity given the plaintiff to amend. In the trial court defendant did not claim a variance, but insists that there was a total failure of proof. There was evidence that the north edge of the rug was about one inch south of the north edge of the pad. According to this evidence the pad projected one inch beyond the edge of the rug at the place where plaintiff fell. There was evidence as to ripples or waves at or just south of the north edge of the rug. The rug was a heavy one, apparently 1½ to 2 inches thick. From the evidence the jury had a right to decide that the displacement of the rug's edge, combined with its wavelike elevation, formed a perilous obstacle in the path of plaintiff. In our opinion plaintiff introduced evidence to warrant the jury in finding that for a considerable length of time before the accident the defendant permitted the condition to exist and that in the exercise of ordinary diligence it should have discovered such condition and remedied it. There was also competent evidence that plaintiff was in the exercise of due care for her own safety. We agree with plaintiff that the rug was turned back in the sense that it "was folded or partially folded" so as to expose a one inch margin of the ozite pad, and that it was turned back so as to form a wave or ripple.

only on the proof of the negligence charged in the complaint, states that there is no evidence tending to prove the allegations charged in the complaint, and asserts that it cannot find in the record any testimony that the rug was "turned back upon a certain rubber mat" as alleged in the complaint. Defendant maintains that the testimony most favorable to the plaintiff was that the mat's edge cut about an inch beyond the rug and that there were some ripples in the rug. Defendant also urges that this was a clear variance and failure of proof and that the court erred in refusing to direct a verdict for the defendant. Defendant recognizes the rule that a mere variance is waived unless objection is made in the trial court and an opportunity given the plaintiff to amend. In the trial court defendant did not claim a variance, but insists that there was a total failure of proof. There was evidence that the north edge of the rug was about one inch south of the north edge of the mat. According to this evidence the mat projected one inch beyond the edge of the rug at the place where plaintiff fell. There was evidence of no ripples or waves at or just south of the north edge of the rug. The rug was a heavy one, apparently 1½ to 2 inches thick. From the evidence the jury had a right to decide that the displacement of the rug's edge, combined with its wavelike elevation, formed a material obstacle in the path of plaintiff. In our opinion plaintiff introduced evidence to warrant the jury in finding that for a considerable length of time before the accident the defendant permitted the condition to exist and that in the exercise of ordinary diligence it should have discovered such condition and remedied it. There was also competent evidence that plaintiff was in the exercise of due care for her own safety. We agree with plaintiff that the rug was turned back in the sense that it "was folded or partially folded" so as to expose a one inch margin of the mat's pad, and that it was turned back so as to form a wave or ripple,

We cannot agree with the contention of defendant that there was a failure of proof. There was a variance. The variance was not called to the attention of the court. At the close of plaintiff's case defendant moved to exclude all the evidence and to direct a verdict of not guilty. This was not equivalent to raising the point of variance. While there was a variance there was not a failure of proof, and defendant not having raised the point of variance, it was waived. In our opinion the evidence presented a question of fact for the jury to resolve.

The third instruction given for the plaintiff reads as follows:

"The court instructs the jury that if you find and believe from a preponderance of the evidence that the defendant rented parts of the hotel mentioned in the evidence to various persons and that it maintained control of the lobby and floors thereof, which was used in common by other tenants of said building, if you so find, and, if you further find that the defendant permitted the carpet mentioned in the evidence to be in a dangerous condition and that it remained in said condition for a sufficient length of time for the defendant in the exercise of ordinary care to have known of said dangerous condition and that in so permitting said dangerous condition the defendant was negligent, if you so find, and that plaintiff lived as a tenant of the defendant in said building and at and immediately before the occurrence in question, was in the exercise of ordinary care for her own safety and that as a direct result of the negligence of the defendant in permitting the carpet to be in a dangerous condition, if you find the carpet was in a dangerous condition and defendant was negligent in respect thereto, the plaintiff was injured, then you should find the defendant guilty."

This instruction directs a verdict. The rule is that when a peremptory instruction omits a fact or circumstance essential to recovery, such error in the instruction cannot be cured by any further instruction in the series of instructions. Hanson v. Trust Company of Chicago, 380 Ill. 194. Defendant asserts that under this instruction nothing is required to be found from a preponderance of the evidence, or from any evidence, except that the defendant ran a hotel and kept control of the floors and lobbies. Plaintiff meets this argument by citing Village of Altamont v. Carter, 196 Ill. 286, where the court said (287):

We cannot agree with the contention of defendant that there was a failure of proof. There was a variance. The variance was not called to the attention of the court. At the close of plaintiff's case defendant moved to exclude all the evidence and to direct a verdict of not guilty. This was not sufficient to raising the point of variance. While there was a variance there was not a failure of proof, and defendant not having raised the point of variance, it was waived. In our opinion the evidence presented a question of fact for the jury to resolve.

The third instruction given for the plaintiff reads as follows:

> "The court instructs the jury that if you find and believe from a preponderance of the evidence that the defendant rented parts of the hotel mentioned in the evidence to various persons and that it maintained control of the lobby and floors thereof, which was used in common by other tenants of said building, if you so find, and, if you further find that the defendant permitted the persons mentioned in the evidence to be in a dangerous condition and that it remained in said condition for a sufficient length of time for the defendant in the exercise of ordinary care to have known of said dangerous condition and that in so permitting said dangerous condition the defendant was negligent, if you so find, and that plaintiff lived as a tenant of the defendant in said building and at and immediately before the occurrence in question, was in the exercise of ordinary care for her own safety and that as a direct result of the negligence of the defendant in permitting the parties to be in a dangerous condition, if you find the former was in a dangerous condition and defendant was negligent in respect thereto, the plaintiff was injured, then you should find the defendant guilty."

This instruction directs a verdict. The rule is that when a peremptory instruction omits a fact or circumstance essential to recovery, such error in the instruction cannot be cured by any further instruction in the series of instructions. Hanson v. Great Company of Chicago, 280 Ill. 194. Defendant concedes that under this instruction nothing is required to be found from a preponderance of the evidence, or from any evidence, except that the defendant was a tenant and had control of the floors and lobbies. Plaintiff meets this argument by citing Village of Altamont v. Carter, 198 Ill. 496, where the court said (487):

"A requirement in the first part of an instruction that the jury must base their findings upon the evidence applies and extends to all subsequent clauses in the instruction, and it is unnecessary in each of the succeeding sentences to inform the jury that they must find from a preponderance of the evidence."

The opinion in the latter case does not quote the instruction. In Miller v. Balthasser, 78 Ill. 302, the court said (305):

"As to the second objection to the instruction, while the jury have no right to form a belief other than from the evidence, and while it would be error for the court to instruct them in such a manner that their verdict could be based upon a belief not founded upon the evidence introduced on the trial, yet it has never been held to be necessary to repeat in each clause of an instruction that the jury must believe from the evidence. The first clause of the instruction expressly informs the jury that their belief must be formed from the evidence, and, while the same is not repeated in the latter clause, a jury composed of sensible men could not infer that they had the right to travel outside of the record in search of proof upon which to form a verdict."

Following these authorities we conclude that it was not necessary for the third instruction to repeat in each clause that the jury must believe from a preponderance of the evidence. Defendant criticizes this instruction on the ground that it should have required proof of the dangerous condition and length of time in that condition at and immediately prior to the occurrence. It will be observed that that part of the instruction reads: "If you further find that the defendant permitted the carpet mentioned in the evidence to be in a dangerous condition". In our opinion, from these words the jury would understand that the time referred to was that of and prior to the occurrence. Defendant, further complaining of this instruction, states that the dangerous condition of the carpet to be considered by the jurors should have been limited to the negligence charged "in the declaration". Our Supreme Court has held that the trial court should instruct the jury as to the issues without referring them to the pleadings to ascertain what they are. The instruction substantially followed the language of the complaint

"A requirement in the first part of the instruction [illegible] that the jury must base their findings upon the evidence [illegible] extends to all witnesses alluded to in the instruction, but it is unnecessary in each of the succeeding sentences to instruct the jury that they must find from a preponderance of the evidence."

The opinion in the instant case does not cover the instruction. In Miller v. Baltimore, 70 Md. 305, the court said (309):

"As to the second objection to the instruction, which the jury have no right to find to have been from the evidence, and while it would be error for the court to instruct them in such a manner that their verdict could be based upon a belief not founded upon the evidence introduced on the trial, yet it has never been held to be necessary to repeat in each clause of an instruction that the jury must believe that the evidence the first clause of the instruction necessarily assumes the jury that their belief must be founded from the evidence, and, while the case is not reported in the latter clause, a jury composed of sensible men could not infer that they can disregard the testimony outside of the record in support of such a verdict."

Following these authorities we conclude that it was not necessary for the third instruction to repeat in each clause that the jury must believe from a preponderance of the evidence. Moreover, criticism this instruction on the ground that it should have required proof of the dangerous condition and length of time it had existed prior to the accident, is inadmissible. It will be observed that that part of the instruction reads: "If you further find that the defendant permitted the sewer construction in the sidewalk to be in a dangerous condition". In our opinion, from these words the jury would understand that the time referred to was that of and prior to the accident. Defendant, further criticizing of this instruction, states that the dangerous condition of the sewer to be considered by the jurors should have been limited to the negligence charged "in the declaration". Our Supreme Court has held that the trial court should instruct the jury as to the law without referring them to the pleadings to ascertain what they are. The instruction substantially followed the language of the complaint

and was applicable to the facts, and we conclude the court did not err in giving the instruction complained of. Defendant also complains about the giving of the following instruction at the instance of plaintiff:

> "The law did not require of the plaintiff the exercise of an extraordinary degree of care. All that was required of her was the exercise, at and before the time of the injury, of ordinary care, in view of all the facts and circumstances shown by the proof; and what is ordinary care depends upon the circumstances of each particular case, and it is such care as a person of ordinary prudence would exercise under the same or similar circumstances as those shown by the proof."

This instruction was approved in West Chicago St. R. R. Co. v. McNulty, 166 Ill. 203; Chicago & Alton R. R. Co. v. Fisher, 141 Ill. 614; and Walsh v. Chicago Railways Co., 303 Ill. 339.

In his closing argument counsel for plaintiff stated: "More may have tripped. We don't know, but if such be the fact they have the evidence available. They could have brought people here if they wanted to and told you that nobody else tripped that day. Yet you did not hear one word about it, did you? The conclusion that you may draw from that is that it is entirely within the province that maybe other people tripped there that day also." The court sustained an objection to and directed the jury to disregard this argument. Counsel for plaintiff then resumed: "In any event, ladies and gentlemen, you hear nothing - ." At this juncture defendant objected and moved to withdraw a juror and to continue the case on account of prejudice. These motions were denied. The attorney for plaintiff then continued: "If they have evidence within their province or under their knowledge and control and they fail to produce it - ." The court interrupted counsel, informing him that the argument was incompetent and directed him to desist. The attorney for the defendant again moved, without success, to withdraw a juror and to continue the case on account of prejudice. Control over the argument is within the sound discretion

and was applicable to the facts, and we conclude the trial did not err in giving the instruction complained of. Defendant also complains about the giving of the following instruction at the request of plaintiff:

"The law did not require of the plaintiff the duty of an extraordinary degree of care. All that was required of her was the exercise, at and before the time of the injury, of ordinary care, in view of all the facts and circumstances shown at the trial; and what is ordinary care depends upon the circumstances of each particular case, and it is such care as a person of ordinary prudence would exercise under the same or similar circumstances as shown by the proof."

This instruction was approved in West Chicago St. R. Co. v. Doyle, 149 Ill. 202; Chicago & Alton R. R. Co. v. Tranney, 167 Ill. 314; and Zelie v. Chicago Railway Co., 207 Ill. 545.

In his closing argument counsel for plaintiff stated: "More may have trimmed. We don't know, but it was on the fact that they have the evidence available. They could have brought people here if they wanted to and told you that nobody else tripped that day. Yet you did not hear one word about it, did you? The conclusion that you may draw from that is that it is entirely within the instinct that maybe other people tripped there that day also." The court sustained an objection to and directed the jury to disregard this argument. Counsel for plaintiff then remarked: "In any event, ladies and gentlemen, you hear nothing - ." At this juncture defendant objected and moved to withdraw a juror and to continue the case on account of prejudice. These motions were denied. The attorney for plaintiff then continued: "If they have evidence within their provinces or under their knowledge and control and they fail to produce it - ." The court interrupted counsel, informing him that the argument was incompetent and directed him to desist. The attorney for the defendant then moved, without success, to withdraw a juror and to continue the case on account of prejudice. Control over the argument is within the sound discretion

of the court. There is nothing in the record to suggest that these remarks would arouse the passion and prejudice of the jury against the defendant. In view of the prompt action of the court in sustaining defendant's objection to the argument and the directions to disregard such argument and instruction to the same effect, our view is that the remarks are not grounds for reversal.

Defendant states that the verdict was immoderate and extremely excessive and was so recognized by the trial judge when he ordered that one-third of it should be remitted. Defendant further states that such a verdict, on its face, shows prejudice or disregard of the instructions or the evidence. Plaintiff insists that the judgment is moderate in amount and less than reasonably compensatory to plaintiff for the injuries she received. Defendant cites 53 A. L. R., 709, and Loewenthal v, Strong, 90 Ill. 75, for the proposition that an immoderately excessive verdict is not cured by remittitur. In the Loewenthal case, an action for malicious prosecution, there was a verdict for $10,000. The court required a remittitur for $4,000 and entered judgment for $6,000. In reversing the judgment, the court said (76):

"But if it were conceded that there was not probable cause, and that appellant was actuated by malice, still the verdict of ten thousand dollars is outrageously excessive. It could only have been induced by prejudice, passion, or total misconception of the case. And when it is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, the remittitur does not remove the prejudice, passion or misconception. These elements may have entered, and probably did enter into the finding of other facts important to the issue, if not the issue itself. Such feelings would naturally lead to an unfair finding against appellant. But if this were not so, still, under this evidence, we regard $6,000 as grossly excessive, and the judgment should not be permitted to stand * * *."

In Chicago City Railway Co. v. Gemmill, 209 Ill. 638, the jury's verdict of $12,500 was reduced by $6,500 and a judgment of $6,000 entered. In Chicago & Alton R. R. Co. v. Lewandowski, 190 Ill. 301, the action of the Appellate Court in allowing a remittitur of $4,500 from a judgment for $10,500, was approved. Plaintiff's injuries

of the court. There is nothing in the record to suggest that these remarks could arouse the passion and prejudice of the jury against the defendant. In view of the proper advice of the court in sustaining defendant's objection to the argument and the directions to disregard such argument and instruction to the jury effect, our view is that the remarks are not grounds for reversal.

Defendant states that the verdict was immoderate and extremely excessive and was not reduced by the trial judge when he ordered that one-third of it should be remitted. Defendant further states that such a verdict, on its face, shows prejudice or disregard of the instructions or the evidence. Plaintiff insists that the judgment is moderate in amount and less than reasonably compensatory to plaintiff for the injuries she received. Defendant cites 52 A. L. R., 720, and Lowenthal v. Krone, 90 Ill. 75, for the proposition that an immoderately excessive verdict is not cured by remittitur. In the Lowenthal case, an action for malicious prosecution, there was a verdict for $10,000. The court required a remittitur for $4,000 and entered judgment for $6,000. In reversing the judgment, the court said (75):

> "But if it were conceded that there was no probable cause, and that appellant was actuated by malice, still the verdict of ten thousand dollars is outrageously exorbitant. It could only have been induced by prejudice, passion, or total misconception of the case. And when it is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, the remittitur does not remove the prejudice, remove the misconception. These elements may have entered, and evidently did enter into the finding of other facts important to the issue, if not the issue itself. Such findings would naturally lead to an unfair finding against appellant. But if this were not so, still, under this evidence, we deem $4,000 as grossly excessive, and the judgment should not be permitted to stand."

In Chicago City Railway Co. v. Carroll, 209 Ill. 448, the jury's verdict of $14,000 was reduced by $6,500 and a judgment of $7,500 entered. In Chicago & Alton R. R. Co. v. Lewandowski, 140 Ill. 321, the action of the Appellate Court in allowing a remittitur of $4,500 from a judgment for $10,000, was approved. Plaintiff's injuries

are of such a character as to handicap her in her activities of life. The action of the trial judge in requiring a remittitur was proper. We are of the opinion that the judgment entered by the trial court, after having required a remittitur, is excessive. Whether a verdict is so flagrantly excessive as to be accounted for on the grounds of prejudice, passion or misconception, requiring a reversal, despite a remittitur, depends upon facts of the case. The facts in the Loewenthal case and other cases where judgments were reversed because of excessive verdicts, clearly warranted such action by the reviewing court. We are convinced that under the factual situation presented in the instant case, the action of the jury in awarding excessive damages does not show that they were influenced by prejudice, passion or misconception, and we are of the opinion that there should be a further remittitur of $3,500.

Because of these views, the judgment of the Superior Court of Cook County is affirmed, providing the plaintiff (assignee) files in this court within ten days a further remittitur of $3,500, reducing the judgment to $6,500; otherwise, the judgment is reversed and the cause remanded for a new trial.

JUDGMENT AFFIRMED UPON FURTHER REMITTITUR; OTHERWISE, JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

HEBEL, P.J. AND KILEY, J. CONCUR.

are of such a character as to manifest her injury, activities or life. The action of the trial judge in remitting a remittitur was proper. We are of the opinion that the judgment entered by the trial court, after having required a remittitur, is excessive. Whether a verdict is so flagrantly excessive as to be accounted for on the grounds of prejudice, passion or misconception, requiring a reversal, despite a remittitur, depends upon facts of the case. The facts in the Lowenthal case and other cases where judgments were reversed because of excessive verdicts, clearly warranted such action by the reviewing court. We are convinced that under the factual situation presented in the instant case, the action of the jury in awarding excessive damages does not show that they were influenced by prejudice, passion or misconception, and we are of the opinion that there should be a further remittitur of $5,000.

Because of these views, the judgment of the Superior Court of Cook County is affirmed, requiring the plaintiff (appellee) file in this court within ten days a further remittitur of $5,000, reducing the judgment to $4,500; otherwise, the judgment is reversed and the cause remanded for a new trial.

JUDGMENT AFFIRMED UPON FURTHER REMITTITUR; OTHERWISE, JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

HEBEL, P.J., and SILKY, J., concur.

42858

322 I.A. 697

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| MATCHLESS METAL POLISH COMPANY, a corporation, Plaintiff, v. GEORGE KNIPPEL, et al., Defendants. | APPEAL FROM CIRCUIT COURT COOK COUNTY. |
| Appeal of EDWARD A. MILLER, Objector, Appellant, v. FLORENCE R. CANNON, Administratrix of the Estate of Glenn Cannon, Deceased, Receiver, Appellee. | |

A 150 478

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On March 9, 1934 the Matchless Metal Polish Company, a corporation, filed a complaint in chancery in the Circuit Court of Cook County to foreclose a trust deed, dated June 15, 1925, executed by George Knippel and Margaret Knippel, on the real estate located at 4219 Wentworth Avenue, Chicago. On April 12, 1934 the court appointed Glenn Cannon receiver and he qualified and acted as such. On April 13, 1934 Frances Skonieczny and Walter Pomierski filed their appearance. On May 19, 1934 Frances Skonieczny filed her answer and on May 17, 1934 filed her amended answer. The trust deed was given to secure payment of three principal promissory notes, two being in the sum of $1,500 each and one for the sum of $2,000. Plaintiff alleged that it was the owner and holder of a note in the sum of $1,500, on which $1,000 had been paid; that the other note for $1,500 was paid and canceled, and that the third note in the sum of $2,000 was due and unpaid. In her answer and amended answer Frances Skonieczny asserted that she was the owner and holder of the $2,000 note. Apparently, the suit was abandoned and on the call of the "no progress" calendar, was dismissed for want of prosecution on December 14, 1937. On April 15, 1942 Glenn Cannon died. No

#28958

MARSHALL'S REAL TOLLAR COMPANY, a corporation,

Plaintiff,

v.

GEORGE KNIPPEL, et al.,

Defendants.

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Appeal of EDWARD A. MILLER, Trustee,

Appellant,

v.

FLORENCE M. CARTON, Administratrix of the Estate of Glenn Carton, Deceased, Receiver,

Appellee.

MR. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

On March 9, 1934 the Marshall's Real Tollah Company, a corporation, filed a complaint in chancery in the Circuit Court of Cook County to foreclose a trust deed, dated June 15, 1925, executed by George Knippel and Margaret Knippel, on the real estate located at #2219 Wentworth Avenue, Chicago. On April 16, 1934 the court appointed Glenn Carton receiver and he qualified and acted as such. On April 13, 1934 Frances Shoniceny and Walter Tomczyk filed their appearance. On May 19, 1934 Frances Shoniceny filed her answer and on May 17, 1934 filed her amended answer. The trust deed was given to secure payment of three principal promissory notes, two being in the sum of $1,500 each and one for the sum of $2,000. Plaintiff alleged that it was the owner and holder of a note in the sum of $1,500, on which $1,000 has been paid; that the other note for $1,500 was paid and cancelled, and that the third note in the sum of $2,000 was due and unpaid. In her answer and amended answer Frances Shoniceny asserted that she was the owner and holder of the $2,000 note. Apparently, the suit was abandoned and on the call of the "no progress" calendar, was dismissed for want of prosecution on December 14, 1937. On April 15, 1940 Glenn Carton died. No

accounts with respect to the receivership were ever filed by him. By quit claim deed dated March 12, 1942 George Knippel and Margaret Knippel, his wife, conveyed all their interest in the premises to Edward A. Miller. This deed was recorded March 31, 1942. On April 27, 1942 Florence R. Cannon was appointed administratrix of the estate of Glenn Cannon, deceased, by the Probate Court of Cook County. On October 17, 1942 Edward A. Miller, specially appearing for the sole purpose of praying for relief pertaining to the receivership, filed a petition in this cause, setting up the facts as to the appointment of Glenn Cannon as receiver and his failure to file any account or report. He asked that leave be given him to enter his special appearance, that the receiver surrender possession and file his final report, and for other relief. On the same day the court entered an order granting him leave to file his special appearance, ordered that the receiver surrender possession to petitioner and that he file his final report and account within 10 days. On October 8, 1942 Miller filed a petition setting forth the death of the receiver and praying that an order be entered directing that Florence R. Cannon, administratrix of his estate, file a report and account of the acts and doings of the receiver and for other and further relief. On October 8, 1942 the court ordered the administratrix to file a final report and account within 14 days. She filed a report on October 20, 1942, stating that diligent search and inquiry had been made from which it appears that there are no records of the receivership; that Glenn Cannon, during the period of the receivership, was an officer of plaintiff corporation; that she is informed and believes and therefore states the fact to be that had Glenn Cannon, as receiver, come into possession of any income or assets of the estate, the records in the office of the plaintiff corporation would disclose such receipts; that the records of plaintiff corporation contain no notation of the receipt of any income or assets during the period of the receivership;

accounts with respect to the receivership were ever filed by him. By quit claim deed dated March 1, 1942 George Knippel and Margaret Knippel, his wife, conveyed all their interest in the premises to Edward A. Miller. This deed was recorded March 31, 1942. On April 27, 1942 Florence R. Cannon was appointed administratrix of the estate of Glenn Cannon, deceased, by the Probate Court of Cook County. On October 17, 1942 Edward A. Miller, specially appearing for the sole purpose of praying for relief pertaining to the receivership, filed a petition in this cause, setting up the facts as to the appointment of Glenn Cannon as receiver and his failure to file any account or report. He asked that leave be given him to enter his special appearance, that the receiver surrender possession and file his final report, and for other relief. On the same day the court entered an order granting him leave to file his special appearance, ordered that the receiver surrender possession to petitioner and that he file his final report and account within 10 days. On October 8, 1942 Miller filed a petition setting forth the death of the receiver and praying that an order be entered directing that Florence R. Cannon, administratrix of his estate, file a report and account of the acts and doings of the receiver and for other and further relief. On October 8, 1942 the court ordered the administratrix to file a final report and account within 14 days. She filed a report on October 20, 1942, stating that diligent search and inquiry had been made from which it appears that there are no records of the receivership; that Glenn Cannon, during the period of the receivership, was an officer of plaintiff corporation; that she is informed and believes and therefore states the fact to be that had Glenn Cannon, as receiver come into possession of any income or assets of the estate, the records in the office of the plaintiff corporation would disclose such receipts; that the records of plaintiff corporation contain no notation of the receipt of any income or assets during the period of the receivership;

that the records show the general real estate taxes for the year 1938 were paid on March 15, 1940 in the sum of $54.99 and that the general taxes for the year 1940 were paid on April 29, 1941 in the sum of $60.18. She concluded her report by stating that upon information and belief Glenn Cannon, as receiver, received no income or assets of any kind from the real estate. Mr. Miller filed objections to the report, stating that the report should be disapproved and that the account of the deceased receiver should be charged with a reasonable amount that should have been received from the real estate during the receivership. The objections stated that the store had not been rented during the period of the receivership; that the apartment had been occupied by a party named Sorensen; that he did not know whether the garage had been occupied or rented; that he did not know whether the receiver ever collected any rents for the occupancy of the premises; that the reasonable rental value of the store during the period was $10 a month, the apartment $25 a month, and the garage $5 a month, or a total of $40 a month. He asked that his objections be sustained and that the administratrix be directed to account for the moneys that were received or should have been received by the receiver. On December 9, 1942 the report of the administratrix and the objections were referred to a Master in Chancery. After taking testimony and hearing the arguments of the parties he reported, recommending that the chancellor overrule the objections. The objections were permitted to stand as exceptions. The chancellor overruled the exceptions, approved the report and account of the administratrix and released and discharged the surety on the receiver's bond. Mr. Miller appeals.

Appellant asserts thata receiver appointed to collect rents, must account for all rent collected, or which he could have collected by the exercise of reasonable diligence; that he is expected to

that the records show the general real estate taxes for the year 1938 were paid on March 15, 1940 in the sum of $54.99 and that the general taxes for the year 1940 were paid on April 29, 1941 in the sum of $60.12. She concluded her report by stating that upon information and belief Glenn Gannon, as receiver, received no income or assets of any kind from the real estate. Mr. Miller filed objections to the report, stating that the report should be disapproved and that the account of the deceased receiver should be charged with a reasonable amount that should have been received from the real estate during the receivership. The objections stated that the store had not been rented during the period of the receivership; that the apartment had been occupied by a party named Dorneen; that he did not know whether the garage had been occupied or rented; that he did not know whether the receiver ever collected any rents for the occupancy of the premises; that the reasonable rental value of the store during the period was $10 a month, the apartment $25 a month, and the garage $5 a month, or a total of $40 a month. He asked that his objections be sustained and that the administratrix be directed to account for the moneys that were received or should have been received by the receiver. On December 9, 1942 the report of the administratrix and the objections were referred to a Master in Chancery. After taking testimony and hearing the arguments of the parties he reported, recommending that the chancellor overrule the objections. The objections were permitted to stand as exceptions. The chancellor overruled the exceptions, approved the report and account of the administratrix and released and discharged the surety on the receiver's bond. Mr. Miller appeals.

Appellant asserts that a receiver appointed to collect rents must account for all rent collected, or which he could have collected by the exercise of reasonable diligence; that he is expected to

exercise the care of an ordinarily prudent person in renting the premises; that he is expected to collect rent from parties who occupy the premises, and that upon his failure to use such care in renting and upon his failure to collect rent for such occupancy, he will be surcharged with the amount he failed to collect. He insists that in this case the receiver was negligent in his duty in that he failed to use reasonable diligence to realize a reasonable amount of rent from the premises, and that he allowed the Sorensens to occupy the premises without payment of rent. We agree that the duty of the receiver is substantially as stated by the appellant. We agree with appellee that the mere failure, without more, of a receiver, appointed to collect rents, to collect them, is not conclusive proof of his culpable negligence. Whether a receiver, as an officer of the court, exercises reasonable diligence and prudence in managing the property and collecting the rents, depends upon the factual situation. The real estate involved is located at 4219 Wentworth Avenue, Chicago, and is about 25 feet wide by 125 feet in depth. The first floor was formerly occupied as a furniture store. In the back of the premises was a 16 foot alley. There was a big wooden fence and a junk yard extending from 43rd Street to close to the garage and a coal yard near by. The railroad tracks ran back of the premises about 100 feet from the fence. The property was improved with a two story frame building and a two car frame garage at the rear. The first floor of the building was designed for use as a store and the second floor was a six room apartment. The building was 40 or 50 years old and had no basement. In 1942 the two story frame building was wrecked by the City of Chicago. At the time the receiver was appointed the only occupants of the premises were Mr. and Mrs. Godfrey Sorensen, who occupied the second floor apartment, and the property was in a poor state of repair. Shortly after he was appointed receiver he visited the premises and told Mr. and Mrs. Sorensen that they could

exercise the care of an ordinarily prudent person in renting the premises; that he is expected to collect rent from parties who occupy the premises, and that upon his failure to use such care in renting and upon his failure to collect rent for such occupancy, he will be surcharged with the amount he failed to collect. He insists that in this case the receiver was negligent in his duty in that he failed to use reasonable diligence to realize a reasonable amount of rent from the premises, and that he allowed the Sorensens to occupy the premises without payment of rent. We agree that the duty of the receiver is substantially as stated by the appellant. We agree with appellee that the mere failure, without more, of a receiver, appointed to collect rents, to collect them, is not conclusive proof of his culpable negligence. Whether a receiver, as an officer of the court, exercises reasonable diligence and prudence in managing the property and collecting the rents, depends upon the factual situation. The real estate involved is located at 4219 Kenworth Avenue, Chicago, and is about 25 feet wide by 125 feet in depth. The first floor was formerly occupied as a furniture store. In the back of the premises was a 16 foot alley. There was a big wooden fence and a junk yard extending from 43rd Street to close to the garage and a coal yard near by. The railroad tracks ran back of the premises about 100 feet from the fence. The property was improved with a two story frame building and a two car frame garage at the rear. The first floor of the building was designed for use as a store and the second floor was a six room apartment. The building was 40 or 50 years old and had no basement. In 1942 the two story frame building was wrecked by the City of Chicago. At the time the receiver was appointed the only occupants of the premises were Mr. and Mrs. Godfrey Sorensen, who occupied the second floor apartment, and the property was in a poor state of repair. Shortly after he was appointed receiver he visited the premises and told Mr. and Mrs. Sorensen that they could

continue to live there so long as they kept the property in repair. The Sorensens made numerous repairs thereafter and continued to live there until September, 1941, when they moved out. The premises remained entirely vacant since that time. No person or persons other than the Sorensens occupied the premises from the time the receiver was appointed until his death. The Sorensens did not pay any rent. The property is located in a poor neighborhood and the people living there were in the low income brackets and many of them were on public relief from the time of the appointment of the receiver until his death. The master found that in view of the poor state of repair of the premises at the time the receiver took possession and in view of the poor character of the neighborhood, the property was not rentable during the period between the appointment of the receiver and his death. This finding is supported by the record. It was the duty of the receiver to file reports and accounts at the times required by the rules of the Circuit Court. He did not do this. On inspecting the premises and ascertaining the dilapidated condition, he should have reported the facts to the chancellor, with a recommendation that the Sorensens be permitted to occupy the premises without payment of rent, and asked that he be instructed as to his duty in the circumstances. The premises were not rentable and the record abundantly establishes that it was for the best interests of the owners and the mortgagee to have the Sorensens in possession. The latter were reputable people and protected the premises against damage or destruction by vandalism. We are satisfied that had the receiver acquainted the chancellor with the facts he would have been instructed to do what he did in fact. While Mr. Cannon did not follow the approved procedure of filing reports and accounts, and seeking the direction of the court, what he did was what an ordinarily prudent person would do under similar circumstances. Therefore, it would be inequitable to charge his estate with any sum whatsoever.

continue to live there so long as they kept the property in repair. The Borenaens made numerous repairs thereafter and continued to live there until September, 1941, when they moved out. The premises remained entirely vacant since that time. No person or persons other than the Borenaens occupied the premises from the time the receiver was appointed until his death. The Borenaens did not pay any rent. The property is located in a poor neighborhood and the people living there were in the low income brackets and many of them were on public relief from the time of the appointment of the receiver until his death. The master found that in view of the poor state of repair of the premises at the time the receiver took possession and in view of the poor character of the neighborhood, the property was not rentable during the period between the appointment of the receiver and his death. This finding is supported by the record. It was the duty of the receiver to file reports and accounts at the times required by the rules of the Circuit Court. He did not do this. In inspecting the premises and ascertaining the dilapidated condition, he should have reported the facts to the chancellor, with a recommendation that the Borenaens be permitted to occupy the premises without payment of rent, and asked that he be instructed as to his duty in the circumstances. The premises were not rentable and the record abundantly establishes that it was for the best interests of the owners and the mortgagee to have the Borenaens in possession. The latter were responsible people and protected the premises against damage or destruction by vandalism. We are satisfied that had the receiver consulted the chancellor with the facts he would have been instructed to do what he did in fact. While Mr. Cannon did not follow the approved procedure of filing reports and accounts, and seeking the direction of the court, what he did was what an ordinarily prudent person would do under similar circumstances. Therefore, it would be inequitable to charge his estate with any sum whatsoever.

Appellant maintains that the pleadings consist of the receiver's report, filed in his behalf by the administratrix of his estate, and the objections to the report; that the objections stated material allegations of fact; that the administratrix neither amended the report nor filed any reply to the objections; that the "issues were formed by the receiver alleging affirmatively in his report and denying the new matter in the objections to his report;" that the allegations, proof and decree must correspond; and that the "receiver" must stand or fall by the case made by "his" pleadings. Appellant urges further that the hearing was on the receiver's report and objections thereto; that the issues are determined by these pleadings and "as they stand the new matter in the objections to the receiver's report was denied". Mr. Miller states that almost the entire proof made by the receiver was not founded on any allegations in the pleadings and that he objected to the introduction of testimony to show that the Sorensens were occupying the premises when the receiver was appointed, that the premises were in a bad state of repair and that the receiver made an agreement with the Sorensens whereby they could continue to live there without payment of rent. He urges that except as to the failure to find any records in the receivership, the proof made by the administratrix is not in accordance with the allegations of the pleadings. Our view is that the testimony introduced by the administratrix for the purpose of justifying the conduct of her husband in the receivership was properly admitted by the master under the petition and objections. It is apparent that Mr. Miller was not taken by surprise by any of the testimony introduced and that he had full opportunity to present any countervailing testimony.

Appellant maintains that the pleadings consist of the receiver's report, filed in his behalf by the administratrix of his estate, and the objections to the report; that the objections stated material allegations of fact; that the administratrix neither amended the report nor filed any reply to the objections; that the "issues were formed by the receiver alleging affirmatively in his report and denying the new matter in the objections to his report;" that the allegations, proof and decree must correspond; and that the "receiver" must stand or fall by the case made by "his" pleadings. Appellant urges further that the hearing was on the receiver's report and objections thereto; that the issues are determined by these pleadings and "as they stand the new matter in the objections to the receiver's report was denied". Mr. Miller states that almost the entire proof made by the receiver was not founded on any allegations in the pleadings and that he objected to the introduction of testimony to show that the premises were occupying the premises when the receiver was appointed, that the premises were in a bad state of repair and that the receiver made an arrangement with the Boreneans whereby they could continue to live there without payment of rent. He urges that except as to the failure to find any rounds in the receivership, the proof made by the administratrix is not in accordance with the allegations of the pleadings. Our view is that the testimony introduced by the administratrix for the purpose of justifying the conduct of her husband in the receivership was properly admitted by the master under the petition and objections. It is apparent that Mr. Miller was not taken by surprise by any of the testimony introduced and that he had full opportunity to present any counterveiling testimony.

The master found that no proof was made as to who was the owner of the property at the time the original suit was commenced or subsequently, nor was there any proof that Mr. Miller, the objector, acquired the rights of the owner of the property in respect to the receivership; that there was no proof that George Knippel and Margaret Knippel, from whom Mr. Miller claims to have received the right to rents, were at any time the owners of the property or entitled to the rents therefrom; that there was no proof that Knippel and his wife transferred to Mr. Miller any right they may have had to the rents; and he concluded that Mr. Miller failed to prove that he has any right to demand an accounting for the rents. In view of our ruling that the receiver exercised reasonable diligence and ordinary prudence in the conduct of the receivership, it is not necessary to consider the other points relied upon by the appellee to sustain the decree. Holding these views, the orders of the Circuit Court of Cook County entered on June 24, 1943 are affirmed.

ORDERS AFFIRMED.

HEBEL, P.J. AND KILEY, J. CONCUR.

The master found that no proof was made as to who was the owner of the property at the time the original suit was commenced or subsequently, nor was there any proof that Mr. Miller, the objector, acquired the rights of the owner of the property in respect to the receivership; that there was no proof that George Knippel and Margaret Knippel, from whom Mr. Miller claims to have received the right to rents, were at any time the owners of the property or entitled to the rents therefrom; that there was no proof that Knippel and his wife transferred to Mr. Miller any right they may have had to the rents; and he concluded that Mr. Miller failed to prove that he has any right to demand an accounting for the rents. In view of our ruling that the receiver exercised reasonable diligence and ordinary prudence in the conduct of the receivership, it is not necessary to consider the other points relied upon by the appellee to sustain the decree. Holding these views, the orders of the Circuit Court of Cook County entered on June 24, 1943 are affirmed.

ORDERS AFFIRMED.

HEDEL, P.J. AND KILEY, J. CONCUR.

42879

322 I.A. 698

VAN V. LAIN and WILLIAM LAIN, doing business as LAIN & SON,

Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed in the Municipal Court of Chicago against Metropolitan Life Insurance Company, a corporation, Van V. Lain and William Lain, morticians, doing business as Lain & Son, asked judgment for $325, based upon an assignment by the beneficiary of his interest in a policy of life insurance. Issue was joined. A trial before the court without a jury resulted in a finding and judgment for the defendant. Plaintiff appeals.

The policy was issued on September 4, 1939 to Catherine Krka and continued in full force until October 14, 1942, when she died. It was an "industrial" type of insurance policy. One of the provisions of the policy reads: "Nonassignability. Any assignment or pledge of this Policy or of any of its benefits shall be void." After the death of the insured, and on the same day, John Krka, the widower and beneficiary, for value received, executed and delivered to plaintiffs an assignment of all his right, title and interest in the policy. It appears that the amount of defendant's liability under the policy was $299.70. Plaintiffs presented evidence in support of their contention that in due time they delivered to defendant the policy, assignment and proof of death. On November 13, 1942 defendant, at its home office, issued its check payable to the order of John Krka in full payment of the

42879

VAN V. LAIN and WILLIAM LAIN, doing business as LAIN & SON,

Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed in the Municipal Court of Chicago against Metropolitan Life Insurance Company, a corporation, Van V. Lain and William Lain, merchants, doing business as Lain & Son, asked judgment for $325, based upon an assignment by the beneficiary of his interest in a policy of life insurance. Issue was joined. A trial before the court without a jury resulted in a finding and judgment for the defendant. Plaintiff appeals.

The policy was issued on September 4, 1929 to Catherine Kirke and continued in full force until October 14, 1942, when she died. It was an "industrial" type of insurance policy. One of the provisions of the policy reads: "Nonassignability. Any assignment or pledge of this policy or of any of its benefits shall be void." After the death of the insured, and on the same day, John Kirke, the widower and beneficiary, for value received, executed and delivered to plaintiffs an assignment of all his right, title and interest in the policy. It appears that the amount of defendant's liability under the policy was $299.70. Plaintiffs presented evidence in support of their contention that in due time they delivered to defendant the policy, assignment and proof of death. On November 13, 1942 defendant, at its home office, issued its check payable to the order of John Kirke in full payment of the

amount due under the policy. He endorsed this check and it was paid to him through banking channels. The only issue of fact raised by the pleadings is plaintiff's allegation that they delivered the instrument of assignment to defendant and defendant's denial of its receipt.

Plaintiffs urge that the assignment, made after the death of the insured, is an assignment of a chose in action and that the nonassignability clause does not affect their right to receive the proceeds of the policy. Defendant resists this argument and maintains that the nonassignability clause is effective and enforcible. The court did not rule directly on this point. The point, however, was urged by the defendant. On appeal by plaintiffs, defendant is entitled to urge every ground presented by the record which supports the judgment in its favor. In People v. Bradford, 372 Ill. 63, the court said (65,66):

"The judgment appealed from was for appellees, and no part of it was adverse to them. They were, therefore, in no position to prosecute a cross-appeal. Having obtained all the relief they deemed themselves entitled to, they may sustain the judgment upon any ground warranted by the record, though they may wish to show the court below erred in not giving it to them on different or additional grounds."

Hence, the defendant has the right to urge that the assignment of the policy or any of its benefits is void. In an opinion in the case of Van V. Lain and William Lain, doing business as Lain & Son, v. Metropolitan Life Insurance Company, a corporation, filed concurrently herewith, we have ruled adversely to plaintiff's contention, and it is therefore unnecessary to discuss this proposition in the instant case.

On the question of fact the court found that the assignment was not received by defendant. Plaintiffs insist that the evidence as to the receipt of the assignment is uncontradicted, and that the

amount due under the policy. He endorsed this check and it was paid to him through banking channels. The only issue of fact raised by the pleadings is plaintiff's allegation that they delivered the instrument of assignment to defendant and defendant's denial of its receipt.

Plaintiffs urge that the assignment, made after the death of the insured, is an assignment of a chose in action and that the non-assignability clause does not affect their right to receive the proceeds of the policy. Defendant reiterates this argument and maintains that the nonassignability clause is effective and enforcible. The court did not rule directly on this point. The point, however, was urged by the defendant. On appeal by plaintiffs, defendant is entitled to urge every ground presented by the record which supports the judgment in its favor. In People v. Bradford, 372 Ill. 68, the court said (68,69):

> "The judgment appealed from was for appellees, and no part of it was adverse to them. They were, therefore, in no position to prosecute a cross-appeal. Having obtained all the relief they deemed themselves entitled to, they may sustain the judgment upon any ground warranted by the record, though they may wish to show the court below erred in not giving it to them on different or additional grounds."

Hence, the defendant has the right to urge that the assignment of the policy or any of its benefits is void. In an opinion in the case of Van V. Lain and William Lain, doing business as Lain & Son, v. Metropolitan Life Insurance Company, a corporation, filed concurrently herewith, we have ruled adversely to plaintiff's contention, and it is therefore unnecessary to discuss this proposition in the instant case.

On the question of fact the court found that the assignment was not received by defendant. Plaintiffs insist that the evidence as to the receipt of the assignment is uncontradicted, and that the

facts, when logically presented are convincing that the trial judge erred in not following their logic and sequence. They assert that the question is not one of the weight of the evidence, but that it is one of misconstruction of uncontroverted evidence. We have carefully read the transcript of the testimony and the exhibits and are satisfied that the finding of the court that defendant did not receive the assignment is amply supported by the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED

HEBEL, P.J., and KILEY, J, CONCUR

facts, when logically presented are convincing that the trial judge erred in not following their lead and sequence. They assert that the question is not one of the weight of the evidence, but that it is one of misconstruction of uncontroverted evidence. We have carefully read the transcript of the testimony and the exhibits and are satisfied that the finding of the court that defendant did not receive the assignment is amply supported by the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED

HEBEL, P.J., and KILEY, J., concur.

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| HERBERT NOVITSKY and FANNIE NOVITSKY, Appellants, v. THOMAS P. BOLAND, JR., Appellee. | ) | APPEAL FROM SUPERIOR COURT COOK COUNTY. |

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MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Herbert Novitsky and Fannie Novitsky filed their complaint in the Superior Court of Cook County against Thomas P. Boland, Jr., to recover damages for injuries sustained on April 14, 1941. A trial before the court and a jury resulted in a verdict finding the defendant guilty, and assessing Herbert Novitsky's damages at $500 and Fannie Novitsky's damages at $1,000. A motion by plaintiffs for a new trial was denied and judgment was entered on the verdict. Plaintiffs appeal.

Plaintiffs, mother and son, were injured about 7:00 p.m. on April 14, 1941 on a sidewalk at the southwest corner of Foster Avenue and Broadway in Chicago after they had crossed from the north side of Foster Avenue to the south side on the west crosswalk of the intersection. Defendant's eastbound automobile ran up on the sidewalk and struck them, although the "Stop and Go" lights at the intersection were green for north and southbound traffic and red for east and westbound traffic on Foster Avenue. Both plaintiffs were knocked down onto the sidewalk when struck and so remained until an ambulance took them to the Swedish Covenant Hospital. Upon the trial defendant contested only as to the nature and extent of each plaintiff's injuries and the damages to which each was entitled.

HERBERT NOVITSKY and FANNIE NOVITSKY,

Appellants,

v.

THOMAS F. DOLAND, Jr.,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

HON. JOHN J. HOLLOWAY, JUDGE OF THE COURT.

Herbert Novitsky and Fannie Novitsky filed their complaint in the Superior Court of Cook County against Thomas F. Doland, Jr., to recover damages for injuries sustained on April 14, 1941. A trial before the court and a jury resulted in a verdict finding the defendant guilty, and assessing damages at [illegible] and Fannie Novitsky's damages at $1,000. A motion by plaintiffs for a new trial was denied and judgment was entered on the verdict. Plaintiffs appeal.

Plaintiffs, father and son, were injured about 7:00 p.m. on April 14, 1941 on a sidewalk at the southwest corner of Foster Avenue and Broadway in Chicago after they had crossed from the north side of Foster Avenue to the north side on the west crossing of the intersection. Defendant's eastbound automobile ran up on the sidewalk and struck them, although the "Stop and Go" lights at the intersection were green for north and southbound traffic and red for east and westbound traffic on Foster Avenue. Both plaintiffs were knocked down onto the sidewalk upon strike and so remained until an ambulance took them to the Swedish Covenant Hospital. Upon the trial defendant contested only as to the nature and extent of each plaintiff's injuries and the damages to which each was entitled.

Plaintiffs assert that the verdicts and judgments are grossly inadequate and manifestly against the weight of the uncontradicted evidence relating to the injuries and damages sustained and that the trial court erred in refusing to grant a new trial. Defendant maintains that the verdict and judgments are adequate and not against the manifest weight of the evidence, and that the trial court did not err in denying the motion for a new trial.

Herbert Novitsky was 29 years of age at the time of the trial. Dr. Alexander E. Kaufman, the family physician, was called to the hospital shortly after the plaintiffs arrived there. At first Herbert did not feel much pain. At the direction of Dr. Kaufman x-rays were taken of his back and right leg. He was undressed and put to bed. Tape was placed around his back that evening, extending from under the arms to the buttocks. He was placed on his back. He did not sleep for "a couple of days". At first he did not feel much pain. The pain in his back started "a few days after the accident." The pain was in the small of his back and was constant. He was in the hospital about 13 days. The doctor gave him pills to make him sleep. He lay flat on his back without pillows under his head. During the time he was in the hospital he had pain in the middle of his back up through the shoulder blade and after a few days the calf of his right leg started to hurt. The calf of his leg was not treated. The tape was removed the day he left the hospital and a plaster cast put on. This cast extended all the way around except for a small opening in the front. He was taken home in a car and placed in bed. He was in bed at home constantly for about six weeks and had "some pain" all the time in his back and leg. He could not sleep very well while he was at home. The cast remained on for about six weeks. He "could not stand" the cast any longer and the doctor took it off. Some large pimples developed from the cast or the tape that had been on his back, which

Plaintiff-appellant that the verdict and judgment are wholly inadequate and manifestly against the weight of the uncontroverted evidence relating to the injuries and damages sustained and that the trial court erred in refusing to grant a new trial. Defendant maintains that the verdict and judgment are not against the manifest weight of the evidence, and that the trial court did not err in denying the motion for a new trial.

Between December 20 and 27 of 1[illegible] the time of the trial, Mr. Alexander C. Lucian, his family physician, was called to the hospital shortly after the plaintiffs arrival there. At first Dorothy did not feel much pain. At the direction of Mr. Lucian -- boys were sent to the home for Mrs. Dorothy's leg. He was unknown and put to bed. There was blood around the foot that morning, extending from under the sheet to the entrance. He was closed on his back. He did not claim to "remember or recall". It first he did not feel much pain. The pain in his back started "a few days after the accident." The pain was in the small of the back and was constant. He was in the hospital about 15 days. The doctor gave him pills to make his stomach. He had pills on his back without pillows under his head. During the time he was in the hospital he had pain in the middle of his back. [illegible] and after a few days the pain of his right [illegible] it hurt. The calf of his leg was not painful. The doctor had removed the leg he left the hospital and a cripple with pain. This pain extended all the way around except for a small opening in the front. He was taken home in a car and placed in bed. He was in bed it hurt constantly for about six weeks and had "pain" all the time in his back and leg. He could not [illegible] walk. He "could not stand" the cast any longer and the doctor took it off. Some large pieces developed from the cast or the [illegible] on his back, which

made the skin itchy and made him feel "very miserable". He continued taking sleeping pills while the cast was on. After the cast was removed he got out of bed and the doctor put tape on his back. The tape remained on for about two weeks. He went back to work the latter part of June in the shoe department of Mandel Brothers, where he had been employed before the accident, selling shoes. In doing that kind of work he used his back bending down trying on shoes. His average wage during the time he worked at Mandel Brothers before the accident was $32 to $35 a week. He also had a job in the evenings three times a week, where he earned between $4 and $6 per evening. When he went back to work he first worked in the shoe department. The pain in his back was "terrific". He could not stand up, became very weak and did not finish out the day. He went to the manager, who told him to sit down for a while. The personnel manager told him he would put him in a different department and the next day he put him to work in the sportswear department. He worked there about a week but "could not make any money because it was out of my line". He then took a few days off and went to work for Goldblatts, selling sporting goods and luggage. He worked there five or six months. This work did not require any stooping or hard lifting. He then went to work for another Goldblatt store in charge of the sale of sporting goods and luggage. At these two Goldblatt jobs he was guaranteed $20 against a commission. He worked at the second Goldblatt store about 3½ months. He then went to work for the Austin Company at the Douglas Aircraft plant. He did a little stooping for a while. Then they put him on a job feeding coke salamanders. The salamanders were about 1½ feet in circumference and about 3½ feet high. A coke fire is kept burning in them and they are used for the purpose of keeping concrete warm so it will not freeze. His work was to take care of the salamanders. He had a rod about 3½ feet long with which he removed the ashes. Occasionally

made the skin itchy and made him feel "very miserable". In continued taking sleeping pills which was more than he, after too much had removed he got out of bed and the tension was kept on his back. The tape remained on for about two weeks. He came back to work the latter part of June in the shoe department of Wanamaker's, where he had been employed before the accident, selling shoes. In doing that kind of work he used his back bending down trying on shoes. His average wage during the time he worked at Wanamaker's before his accident was $23 to $25 a week. He also had a job in the evening three times a week, where he earned between $6 and $8 per evening. When he went back to work he first worked in the shoe department. The pain in his back was "terrible". He could not stand up, bending very weak and did not finish out the day. He went to the manager, who told him to sit down for a while. The personnel manager told he would put him in a different department and the best he could do to work in the sportswear department. He worked there about a week but "could not make any money because it was not of my line". He then took a few days off and went to work for Goldblatt's selling wearing goods and luggage. He worked there five or six months. This work did not require any stooping or hard lifting. He then went to work for another Goldblatt store in charge of the sale of wearing goods and luggage. At these two Goldblatt's he was guaranteed $20 against a commission. He worked at the second Goldblatt's store about 8½ months. He then went to work for the Austin Company at the Douglas Aircraft plant. He did a little stooping for a while. Then they put him on a job feeding coke underneath. The underfeeders were about 14 feet in circumference and about 8½ feet high. A coke fire is kept burning in them and they are used for the purpose of heating concrete mixes so it will not freeze. His work was to take care of the underfeeders. He had a rod about 2½ feet long with which he removed the ashes. Occasionally

he shoveled coke. He considered that light work. The coke was light and the work did not require a great deal of stooping. At the time of the trial when he came home in the evening he had a pain in his back. Once in a while during the day his back pained. That depended on how long he was on his feet. Since the accident he married. When he arrived home his wife massaged his back every night. He had never been injured previously and had never suffered any injury to his back. Previous to the accident the condition of his health was good. He said he suffers from headaches, dizziness and "things of that type". After he went back to work he had further treatments from Dr. Kaufman. He went to the doctor's office and "once in a while" the doctor would come to his home. The doctor gave him heat and light treatments and each treatment would last a half hour. Dr. Kaufman left town for the east in June. Up to the time that the doctor left Chicago the treatments were administered about once a month at the doctor's office. When the doctor left for the east he brought a heat lamp to his mother and told Herbert to use it also. He used it quite often, sometimes every day. He used it on his back the first several months. At the time of the trial he was not applying the heat treatments because he did not have the lamp available, "except when he visited his mother". Dr. Kaufman took further x-rays of Herbert's back, but the latter never had possession of these x-rays. A bill from the hospital in the sum of $89.54, not paid, was received in evidence. Up to the time of the trial he had not received a bill from Dr. Kaufman. In the Douglas plant he worked from 7:00 a.m. to 3:00 p.m. and received $62 a week after the 5% victory tax was deducted. On cross-examination, he testified that he started to wear an elastic support upon going back to work. Herbert suggested the elastic support, stating to the doctor that it might be a good thing to wear, and the doctor said "all right, go ahead". The reason why he left Goldblatts

he shoveled coke. He considered that light work. The coke was light and the work did not require a great deal of stooping. At the time of the trial when he came home in the evening he had a pain in his back. Once in a while during the day his back pained. That depended on how long he was on his feet. Since the accident he married. When he arrived home his wife massaged his back every night. He had never been injured previously and had never suffered any injury to his back. Previous to the accident the condition of his health was good. He said he suffers from headaches, dizziness and "things of that type". After he went back to work he had further treatments from Dr. Kaufman. He went to the doctor's office and "once in a while" the doctor would come to his home. The doctor gave him heat and light treatments and each treatment would last a half hour. Dr. Kaufman left town for the east in June. Up to the time that the doctor left Chicago the treatments were administered about once a month at the doctor's office. When the doctor left for the east he brought a heat lamp to his mother and told Herbert to use it also. He used it quite often, sometimes every day. He used it on his back the first several months. At the time of the trial he was not applying the heat treatments because he did not have the lamp available, "except when he visited his mother". Dr. Kaufman took further x-rays of Herbert's back, but the latter never had possession of these x-rays. A bill from the hospital in the sum of $[illegible], not paid, was received in evidence. Up to the time of the trial he had not received a bill from Dr. Kaufman. In the Douglas plant he worked from 7:00 a.m. to 5:00 p.m. and received $22 a week after the $5 victory tax was deducted. On cross-examination, he testified that he started to wear an elastic support upon going back to his work. Hathaway suggested the elastic support, stating to the doctor that it might be a good thing to wear, and the doctor said "all right, go ahead". The reason why he left Goldblatt's

and went to work at the Douglas plant was that he wished to go into defense work.

Fannie Novitsky was 56 years of age at the time of the trial and had been a widow for 18 years. At the time of the accident she worked for Irving Brandt at the Merchandise Mart, having been employed there from September, 1940. She was an operator on a power sewing machine, making suspenders. Before that she worked for C. J. Wilson & Company for 9 years, also on a power sewing machine. She worked on a piece work basis at both places. At the time of the accident she was earning an average of $22 to $23 a week. She worked 5 days a week. In December, 1940 she fell on a sidewalk and had a double fracture of her left leg, being laid up for 2 months. She never had an accident that injured her arms or shoulders. Up to the time of the accident her son was living with her. A sister who worked also lived with her. The three helped in doing the housework. At the time of the accident she was rendered unconscious. While she was lying on the sidewalk she tried to move her right arm but could not do so. She suffered pain all through the length of the right arm and up to the shoulder. After being taken to the hospital she was placed on a table. Hot water packs were placed around her body and feet. At the direction of Dr. Kaufman x-rays were taken. He then "put me to sleep to set my arm, which was fractured". Then "they put me in a metal splint and put me to bed". She testified that the splint was an enormous thing; that it seemed it was on her whole body; that it was made of aluminum or something similar; that her arm was out in front of her in a position which she indicated to the jury; that she was in the hospital about 20 days; that her arm remained in the splint until shortly before she went home. Dr. Kaufman gave her "shots" in the arm while she was in the hospital. She was not able to sleep and he gave her "some kind of pills". Shortly before she went home from the hospital she got up to see whether

and went to work at the Douglas plant was that he wished to go into defense work.

Family Activity was 32 years of age at the time of the trial and had been a widow for 12 years. At the time of the accident she worked for Irving Trust at the Rockefeller Cent, having been employed there from December, 1940. She was an operator on a power sewing machine, making aprons. Before that she worked for G. J. Gilson & Company for 2 years, also on a power sewing machine. She worked on a piece work basis at both places. At the time of the accident she was earning an average of $21 to $23 a week. She worked 5 days a week. In December, 1940 she fell on a sidewalk and had a double fracture of her left leg, being laid up for 2 months. She never had an accident that injured her arms or shoulders. Up to the time of the accident she was living with her. A sister who worked also lived with her. The three helped in doing the housework. At the time of the accident she was rendered unconscious. While she was lying on the sidewalk she tried to move her right arm but could not do so. She suffered pain all through the length of the right arm and up to the shoulder. After being taken to the hospital she was placed on a table. Hot water bottles were placed around her body and feet. At the direction of Dr. Kaufman x-rays were taken. He then "put us to sleep to set my arm, which was fractured". Then "they put me in a metal splint and put me to bed". She testified that the splint was an enormous thing; that it seemed it was on her whole body; that it was made of aluminum or something similar; that her arm was out in front of her in a position which she indicated to the jury; that she was in the hospital about 10 days; that her arm remained in the splint until shortly before she went home. Dr. Kaufman gave her "shots" in the arm while she was in the hospital. She was not able to sleep and he gave her "some kind of pills". Shortly before she went home from the hospital she got up to see whether

she could stand on her feet. The last couple of days before going home she would remain up a few minutes at a time and then go back to bed. After the splint was taken off her right arm and shoulder "they put a cloth around my neck and around my arm, but I couldn't keep the cloth on; this was a sling; I had to hold my hand this way because it seemed to hurt my back and neck. The pain there was very bad and I could not keep anything on there. I did not use the sling any great length of time; I just held one hand on the other, just held them up, that is all I could do". After she went home she had further treatments by Dr. Kaufman. When the doctor came to the hospital he treated her with a "big lamp". He would turn the lamp on her arm and massage it and the shoulder with camphorated oil. This was done at the hospital several times a day. The doctor kept up the treatments at her home until she began going to his office about the middle of June. She was at home for 6 weeks. During this period she received the treatment once a day either from the doctor or from her sister. She took treatments at the doctor's office until June, 1942, at first once a week and after a while every two weeks. She went back to work for the same employer in September, 1941. She did not work full time, but worked several hours a day. The reason she did not work full time was because she could not use her hand. She could not raise it high enough to get to the wheel of the machine. She could not close her hand. She testified that "now I can close my hand during the day but not so good at night. It seems as though the muscles tighten up on me. When I went back to work I had trouble in raising the arm and shoulder and it hurt all the way up to the collar bone. I did not work full time until the last part of November, 1941." She stated that from September, when she went back to work, until the latter part of November, when she started working full time, she earned $6 or $7 a week, and that when she started working full time she began receiving her "old earnings"; that she was doing the same

she could stand on her feet. The last couple of days before going home she would remain up a few minutes at a time and then go back to bed. After the splint was taken off her right arm and shoulder "they put a cloth around my neck and around my arm, but I couldn't keep the cloth on; this was a sling; I had to hold my hand this way because it seemed to hurt my back and neck. The pain there was very bad and I could not keep anything on there. I did not use the sling any great length of time; I just held one hand on the other, just held them up, that is all I could do". After she went home she had further treatments by Dr. Gurnick. When the doctor came to the hospital he treated her with a "big lamp". He would turn the lamp on her arm and massage it and the shoulder with camphorated oil. This was done at the hospital several times a day. The doctor kept up the treatments at her home until she began going to his office about the middle of June. She was at home for 8 weeks. During this period she received the treatment once a day either from the doctor or from her sister. She took treatments at the doctor's office until June, 1942, at first once a week and later a while every two weeks. She went back to work for the same employer in September, 1941. She did not work full time, but worked several hours a day. The reason she did not work full time was because she could not use her hand. She could not raise it high enough to get to the wheel of the machine. She could not close her hand. She testified that "now I can close my hand during the day but not so good at night". It seems as though the muscles tighten up on me. When I went back to work I had trouble in raising the arm and shoulder and it hurt all the way up to the collar bone. I did not work full time until the last part of November, 1941." She stated that from September, when she went back to work, until the latter part of November, when she started working full time, she earned $5 or $7 a week, and that when she started working full time she began receiving her "old earnings"; that she was doing the same

kind of work as formerly; that she uses her left hand "mostly" becase the right hand "seems to be in the way"; that she cannot raise her right hand as high as before the accident; that when she raises it to a certain height there is a strain on it; that if she presses the hand too hard it seems that the muscles "hurt me so bad that I try very hard not to use it too much"; that after she came home she had a girl do her housework a couple of days a week; that at the time of the trial she had a girl come every week to do the housework; that the laundry is sent out; that previous to the accident witness did the laundry; that Dr. Kaufman treated her until he left Chicago in June, 1942; that she was not treated by any other doctor; that the sewing machine she works on is powered by electricity; that it operates when the foot is placed on the pedal; that when the foot is removed from the pedal it stops; that she used her left hand and controlled the wheel up on top with her right hand; that her left hand guides and her right hand controls the wheel; that she works steadily unless when her arm gets so bad she must stay home one or two days to rest it up; that her hand and arm have been getting better right along and were better at the time of the trial than a year before; that during the day she gets enough use out of her hand, but at night the muscles get stiff; and that she does not have any trouble moving her hands. She stated she does not have any trouble using her hands in a certain way, which she indicated to the jury, but that the muscles which she uses in another way, which she also indicated to the jury, ache, and that after she has done a day's work she notices that she is very tired. The bill of the hospital in the sum of $93.44 for services rendered to Fannie Novitsky was received in evidence.

Dr. Kaufman testified that he was licensed to practice medicine in Illinois in 1932 and practiced in Chicago until May, 1942; that he was retired because of ill health; that while practicing in Chicago he engaged mostly in orthopedic and operative surgery; that he was

kind of work as formerly; that she uses her left hand "mostly" because the right hand "seems to be in the way"; that she cannot raise her right hand as high or better the position; that when she raises it to a certain height there is a strain on it; that if she presses the hand too hard it seems that the muscles "hurt me so that I try very hard not to use it too much"; that after she came home she had a girl to her housework a couple of days a week; that at the time of the trial she had a girl come every week to do the housework; that the laundry is sent out; that previous to the accident someone did the laundry; that Dr. Eastman treated her until he left Chicago in June, 1924; that she was not treated by any other doctor; that the sewing machine she works on is powered by electricity; that it operates when the foot is placed on the pedal; that when the foot is removed from the pedal it stops; that she used her left hand and manipulated the wheel up on top with her right hand; that her left hand guides and her right hand controls the wheel; that she works steadily mainly with her arm gets so bad she must stop home and at the days to rest it so; that her hand and arm have been getting better right along and were better at the time of the trial than a year before; that during the day she gets enough use out of her hand, but at night the muscles get stiff; and that she does not have any trouble using her hands in a certain way, which she indicated to the jury, but that the muscles which she uses in another way, which she also indicated to the jury, ache, and that after she has done a day's work she notices that she is very tired. The bill of the doctor's in the sum of $50.00 for services rendered to Minnie Davitsky was received in evidence.

Dr. Eastman testified that he was licensed to practice medicine in Illinois in 1907 and practiced in Chicago until May, 1923; that he has written monographs of his health; that while practicing in Chicago he engaged mostly in anesthesia and operative surgery; that he was

the family physician for plaintiffs; that on April 14, 1941 he was called to the Swedish Covenant Hospital; that he examined Herbert Novitsky; that Herbert told him that his back was very sore, that he could not seem to turn and could not sit up, and that he was in very much pain; that he caused x-rays to be taken; that he examined the patient and found spasticity of the muscles of the back, especially in the lumbar region; that spasticity means rigidity of the muscles and medically indicates a protective measure against injury; that an injury causes the muscles to contract; that there was evidence of swelling present; that he caused the patient's back to be strapped so as to immobilize it; that he had him "take analgesics, something to take care of the pain", and put him to bed; that he had a sand bag put under him so he would be comfortable and would not move around; and had him placed flat on his back. Examining the x-ray, witness stated that it showed part of the sternum and part of the ribs; that the transverse process on the right side of the third lumbar vertebra shows a fracture line; that it is not displaced as most fractures are; that it starts at a certain point, indicating, and "seems to go down all the way in two directions like the letter T", indicating; that the muscles of the vertebra have a pulling effect when there is a definite fracture of the transverse processes; that the muscle may contract if there is any rigidity, and then the injury to the muscle will be replaced by scar tissue; that the muscle would then be impaired considerably and the result would be that the "spine would then not have the pull necessary to erect it"; that the patient was in the hospital for two weeks; that the xx swelling in the region of the third lumbar vertebra was very pronounced; that when the swelling was down he put a body cast on him; that the purpose of the cast was to immobilize where any part of the body has an injury; that the body cast was on about six weeks; that "if kept at rest nature has a way of safeguarding it and the injury will improve

the family physician for plaintiff; that on April 13, 1921 he was called to the Swedish Government Hospital; that he examined Herbert Hovitsky; that Hovitsky told him that his back was very sore, that he could not seem to turn and could not sit up, and that he was in very much pain; that he examined the patient and found something of the nature of a hernia in the lumbar region; that considerably more rigidity of the muscles and medically indicates a corporeality muscular muscular injury; that an injury causes the muscles to contract; also there was evidence of swelling present; that he caused the patient's back to be strapped so as to immobilize it; that he had his "take emplasters, something to take care of the pain", and put him to bed; that he had a hard bag put under him so he would be comfortable and would not move around; and had him placed flat on his back. Examining the x-ray, witness stated that it showed part of the sternum and part of the ribs; that the transverse process on the right side of the third lumbar vertebra shows a fracture line; that it is not displaced as most fractures are; that it stops at a certain point, indicating, and "seems to go down all the way in the directions like the letter T", indicating; that the muscles of the vertebra have a pulling effect when there is a definite fracture of the transverse processes; that the muscle may contract if there is any rigidity, and then the injury to the muscle will be produced by sudden tension; that the muscle would then be impaired considerably and the result would be that the "spine would then not have the full power to stand it"; that the patient was in the hospital for two weeks; that he was walking in the region of the third lumbar vertebra very pronounced; that when the swelling was down he put a body cast on him; that the purpose of the cast was to immobilize where any part of the body has an injury; that the body cast was on about six weeks; that "if kept at rest nature has a way of strengthening it and the injury will improve

under these conditions"; that he gave the patient physio-therapy, diathermy and light treatments and forbade him to do any bending; that the patient complained of pain; that after the cast was removed witness continued with physio-therapy and the patient kept coming to his office for almost a year; that witness took x-rays later on at his office; that the x-rays showed that the fracture healed; that since it is almost two years since the accident occurred and the patient still complains of pain, there is some spasticity in that region; that witness assumed that there must have been some scar tissue in the muscle areas there that caused the spasticity; that when the patient does any bending or twisting exercises, he complains of pain; that the spasticity is not as marked as it previously was; that it is "hard to say whether that condition will be permanent or otherwise", inasmuch as scar tissue never will be replaced by functional tissue; and that $300 would be a reasonable charge for the services rendered to Herbert Novitsky. He testified further that he examined Fannie Novitsky at the hospital the evening of the accident; that she was in "excruciating pain"; that she pointed to her right shoulder; that he looked at it and found there was a deformity of the right shoulder; that he knew she had a dislocation; that he caused an x-ray to be taken, which showed a sub-glenoid dislocation; that the head of the humerus was pushed right out of the cavity; that a piece of bone was torn right out of the head of the humerus bone; that the greater tuberosity was torn away; that he reduced the fracture by putting the head of the humerus back in place in the glenoid cavity; that he further made apposition with the head of the humerus and "it is in pretty good alignment"; that the fracture shows an overlapping; that the fragments are not back in the exact places where they come from because of the overlapping; that after the reduction was made he put on an aeroplane splint to keep the arm

under these conditions"; that he gave the patient physio-therapy, diathermy and light treatments and forbade him to do any bending; that the patient complained of pain; that after the cast was removed witness continued with physio-therapy and the patient kept coming to his office for almost a year; that witness took x-rays later on at his office; that the x-rays showed that the fracture healed; that since it is almost two years since the accident occurred and the patient still complains of pain, there is some causality in that region; that witness concluded that there must have been some scar tissue in the muscle areas there that caused the causality; that when the patient does any bending or twisting exercises, he complains of pain; that the causality is not as marked as it previously was; that it is "hard to say whether that condition will be permanent or otherwise", inasmuch as scar tissue never will be replaced by functional tissue; and that $500 would be a reasonable charge for the services rendered to Herbert Levitsky. He testified further that he examined Minnie Levitsky at the hospital the evening of the accident; that she was in "excruciating pain"; that she pointed to her right shoulder; that he looked at it and found there was a deformity of the right shoulder; that he knew she had a dislocation; that he caused an x-ray to be taken, which showed a sub-glenoid dislocation; that the head of the humerus was pushed right out of the cavity; that a piece of bone was torn right out of the head of the humerus bone; that the greater tuberosity was torn away; that he reduced the fracture by putting the head of the humerus back in place in the glenoid cavity; that he further made apposition with the head of the humerus and "it is in pretty good alignment"; that the fracture shows an overlapping; that the fragments are not back in the exact places where they come from because of the overlapping; that after the reduction was made he put on an aeroplane splint to keep the arm

in a lateral position; that the purpose of the aeroplane splint was to immobilize; that he had been treating the patient for change of life and that her condition was aggravated by her injury; that she was very nervous; that he gave her hormone injections oftener than he had before; that the apposition of the fragments came about very slowly, which he attributed to the breakage of the nerves and the muscle fibres being torn and being replaced by scar tissue; that she complained of numbness in her arm and a feeling of headaches, which he attributed to the injury; that he continued the diathermy and heat treatments until the time he left Chicago; that he left his ultra red machine at her home and that she still has it in her home; that in his opinion there will be "some continuing disability" in her arm; and that $400 is a reasonable charge for the services he rendered to Fannie Novitsky. He testified further that by reduction he meant restoring the member to its normal position. Asked as to whether she has good use of the arm today, witness answered: "Yes sir, I would say she has pretty good motion of it, but it is limited to some extent".

It is the rule in this State that where it is obvious that a jury has failed to take into consideration proper elements of damages which have been clearly proven and have awarded the plaintiff wholly inadequate damages, a motion for a new trial should be sustained by a trial court. We recognize that the amount of damages to be allowed is peculiarly a question for the jury and that the court will not disturb a verdict unless it is clearly excessive or inadequate. The preponderance of the testimony shows that Herbert Novitsky contracted a bill at the hospital in the amount of $89.54; that the reasonable value of the services of Dr. Kaufman are $300; that he lost 9 weeks' wages at $32 a week, or a total of $677.54. The jury awarded him damages of only $500. The jury completely ignored the undisputed testimony as to his pain and suffering, both temporary and permanent, and the future disability he would sustain by reason

in a lateral position; that the degree of the deformation appears to justify; that he had been, for long, the patient for change of life and that her condition was aggravated by her injury; that she was very nervous; that he saw her because intercourse offered than he had before; that the expectation of the frequents made about very slowly, which he attributed to the breakage of the nerves and the muscle fibres being torn and being replaced by scar tissue; that his examination of numbness in her arm and a feeling of headaches, which he attributed to the injury; that he continued the treatment and has a treatments until the time he left Winnipeg; that he left his sister and mother at her home; and that she still has it in her home; that in his opinion there will be "some permanent disability" in her arm; and that pain is a permanent sequelae for the services he rendered to Fannie Novitsky. He testified further that by reduction he meant restoring the muscle to its normal position. Asked as to whether she has good use of her arm today, witness answered: "Yes sir, I would say she has nearly good action of it, but it is limited to some extent".

It is the rule in this Court that where it is obvious that a jury has failed to take into consideration proper elements of damage which have been clearly proven and have awarded the plaintiff wholly inadequate damage, a motion for a new trial should be sustained by a trial court. We recognize that the amount of damage to be allowed is peculiarly a question for the jury and that the court will not disturb a verdict unless it is clearly excessive or inadequate. The preponderance of the evidence shows that Barbara Novitsky contracted a bill at the hospital in the amount of $8.00; that the reasonable value of the services of Dr. Lantman was $500; that he lost 8 weeks' wages at $20 a week, or a total of $677.34. The jury awarded his damages of only $800. The jury completely ignored the uncontradicted testimony as to his pain and suffering, both immediate and permanent, and the future disability he would sustain by reason

of his injuries. As to Fannie Novitsky, the hospital bill was $93.44; the reasonable charge of Dr. Kaufman $400; she lost wages for 23 weeks at $22 a week, or $506, and lost part of her wages for 8 weeks at $16 a week, or $128, an aggregate sum of $1,127.44. The jury awarded her only $1,000. The jury failed to take into consideration either pain or suffering or the partial permanent loss of the use of her hand and arm. A careful reading of the testimony in this case convinces us that the verdict and judgments are grossly inadequate and against the manifest weight of the evidence. Par. F of Sec. 92 of the Civil Practice Act authorizes a reviewing court to give any judgment and make any order which ought to have been given or made, including a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, as the case may require. As the parties are in agreement that the verdict of the jury is just and proper insofar as the liability is concerned, on a retrial of the case the jury should be required to pass only on the question of the damages to be assessed. Of course, in order to determine the nature of the case and of the injuries it will be proper to introduce testimony showing the cause of the injuries.

Because of these views, the judgment of the Superior Court of Cook County is reversed and the cause remanded with directions to proceed in a manner not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND KILEY, J. CONCUR.

of his injuries. As to Young's earnings, the possible bill was not, as; the reasonable charge of Dr. Lundeen (400; she last seen for 24 weeks at $25 a week, or $600, and last part of her work for 8 weeks at $12 a week, or $96, an aggregate sum of $1,127.44. The jury awarded her only $1,000. The jury failed to take into consideration either pain or suffering or the partial permanent loss of the use of her hand and arm. A careful reading of the testimony in this case convinces us that the verdict and judgment are grossly inadequate and against the manifest weight of the evidence. Sec. 7 of Sec. 92 of the Civil Practice Act authorizes a reviewing court to give any judgment and make any order which ought to have been given or made, including a partial reversal, the grant of a partial new trial, the entry of a remittitur, or the issuance of execution, as the case may require. As the parties are in agreement that the amount of the jury is just and proper insofar as the liability is concerned, on a retrial of the case the jury should be required to pay only on the question of the damage to be assessed. Of course, in order to determine the nature of the case and of the injuries it will be proper to introduce testimony showing the cause of the injuries.

Because of these views, the judgment of the Superior Court of Cook County is reversed and the cause remanded with directions to proceed in a manner not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

HEBEL, P.J. and TRUSCH, J. concur.

42914

322 I.A. 699

CLARA M. DUNN,
Appellee,
v.
EDITH L. FRADGLEY, et al.,
On Appeal of ALICE DUNN,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

431
153

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 31, 1942 Clara M. Dunn filed a complaint in chancery in the Superior Court of Cook County against Edith L. Fradgley, Marie Janner and Alice Dunn for the partition of real estate located in Chicago. The summons was returnable on the 1st or 3rd Monday of September, 1942. All defendants were personally served in due time. On August 31, 1942 Alice Dunn filed her appearance and answer. On the same day she filed a counterclaim against plaintiff, her co-defendants and Henry W. Kenoe. She asked that a summons issue against the latter. On September 9, 1942 an appearance and answer were filed for Marie Janner. The record does not show whether any summons was issued for Henry W. Kenoe, or whether he appeared. On October 2, 1942 plaintiff filed a motion to strike and dismiss the counterclaim of Alice Dunn. On October 5, 1942 this motion was set down for hearing on November 5, 1942 at 2:00 P.M. The record shows that on November 4, 1942, the day before the motion to strike was to be heard, the following order was entered: "On motion of attorney for Alice Dunn for change of venue. It is ordered that said motion be continued to Nov. 5th, at 2 P.M. to be heard prior to any other proceedings." On November 5, 1942 Alice Dunn, counterclaimant, filed a petition for change of venue, naming 20 of the 28 judges of the Superior Court, including the Honorable John F. Bolton, who presided. The ground asserted in the

322 I.A. 639

#291#

CLARA M. DUNN,

Appellee,

v.

EDITH L. TRADGLEY, et al.,

On Appeal of ALICE DUNN,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

#391

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 31, 1942 Clara M. Dunn filed a complaint in chancery in the Superior Court of Cook County against Edith L. Tradgley, Marie Tanner and Alice Dunn for the partition of real estate located in Chicago. The summons was returnable on the 1st or 3rd Monday of September, 1942. All defendants were personally served in due time. On August 31, 1942 Alice Dunn filed her appearance and answer. On the same day she filed a counterclaim against plaintiff, her co-defendants and Henry V. Kenoe. She asked that a summons issue against the latter. On September 9, 1942 an appearance and answer were filed for Marie Tanner. The record does not show whether any summons was issued for Henry V. Kenoe, or whether he appeared. On October 2, 1942 plaintiff filed a motion to strike and dismiss the counterclaim of Alice Dunn. On October 5, 1942 this motion was set down for hearing on November 5, 1942 at 2:00 P.M. The record shows that on November 4, 1942, the day before the motion to strike was to be heard, the following order was entered: "On motion of attorney for Alice Dunn for change of venue. It is ordered that said motion be continued to Nov. 9th, at 2 P.M. to be heard prior to any other proceedings." On November 5, 1942 Alice Dunn, counterclaimant, filed a petition for change of venue, naming 20 of the 28 judges of the superior Court, including the Honorable John F. Bolton, who presided. The ground asserted in the

petition for change of venue is that the named judges are members of the Chicago Bar Association and that because of such membership they could not fairly and impartially hear and decide her case. The petition on its face shows that this defendant knew all the facts on which she based her petition as early as September 30, 1942. The petition asserted that the information therein set out came to her knowledge "since the expiration of 30 days after the return date of the summons". The petition also states that envelopes containing "copies of this notice and petition were on the 31st day of October, a.d. 1942 deposited in a mail chute" in a building in the downtown area in Chicago, with proper postage and properly addressed to all parties who entered their appearances. On November 5, 1942, after argument of counsel, it was ordered that the prayer of the petition be denied. The order shows that the attorney for Alice Dunn then announced in open court that he would "stand by said petition". He declined to participate further in the proceedings, taking the position that it was the duty of the court to grant the petition for change of venue. On November 6, 1942 the court (Judge Bolton presiding) entered an order reciting that upon the motion to strike and dismiss the counterclaim of Alice Dunn, and due notice having been served on her attorney and the court being fully advised in the premises, the counterclaim was "stricken and dismissed" and a judgment for costs was entered in favor of plaintiff and against counterclaimant Alice Dunn. On March 30, 1943, on motion of plaintiff and on due notice to all parties, the cause was dismissed. On April 8, 1943 Alice Dunn filed her notice of appeal to the Supreme Court from the order of November 5, 1942, denying a change of venue, the order of November 6, 1942 dismissing the counterclaim and the final order of March 30, 1943 dismissing the cause of action. The Supreme Court transferred the case.

The only point advanced by appellant is that the chancellor erred in denying her petition for a change of venue. The chancellor was right in denying the prayer of the petition for a change of venue.

petition for change of venue in such the named judges are members of the Chicago Bar Association and that because of such membership they could not fairly and impartially hear and decide her case. The petition on its face shows that the defendant knew all the facts on which she based her petition on early as September 30, 1942. The petition asserted that the information therein set out came to her knowledge "since the expiration of 30 days after the return date of the summons". The petition also states that envelopes containing "copies of this notice and petition were on the 21st day of October, a.d. 1942 deposited in a mail chute" in a building in the downtown area in Chicago, with proper postage and properly addressed to all parties who entered their appearance. On November 5, 1942, after argument of counsel, it was ordered that the prayer of the petition be denied. The order shows that the attorney for Alice Dunn then announced in open court that he would "stand by said petition". He declined to participate further in the proceedings, taking the position that it was the duty of the court to grant the petition for change of venue. On November 6, 1942 the court (Judge Dalton presiding) entered an order recalling that upon the motion to strike and dismiss the counterclaim of Alice Dunn, and one notice having been served on her attorney and the court being fully advised in the premises, the counter-claim was "stricken and dismissed" and a judgment for costs was entered in favor of plaintiff and against counterclaimant Alice Dunn. On March 30, 1943, on motion of plaintiff and on due notice to all parties, the cause was dismissed. On April 8, 1943 Alice Dunn filed her notice of appeal to the Supreme Court from the order of November 5, 1942, denying a change of venue, the order of November 6, 1942 dismissing the counterclaim and the final order of March 30, 1943 dismissing the cause of action. The Supreme Court transferred the case.

The only point advanced by appellant is that the chancellor erred in denying her petition for a change of venue. The chancellor was right in denying the prayer of the petition for a change of venue.

The petition does not comply with the statute and does not show that any of the judges named was prejudiced. Furthermore, under Section 9 of the Venue Act a change of venue could not be granted unless the application was made by or with the consent of at least three-fourths of the parties plaintiff or defendant. The application also violated Section 6 of the Venue Act, that no change of venue shall be allowed more than 30 days after the return date, unless the party applying shall give to the opposite party 10 days previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than 10 days of the making of the application. The return day was the first Monday of September, 1942. The application was made more than 30 days after the return day on which she was required to appear. She did not give 10 days previous notice of her intention and she did not assert that the knowledge of the prejudice came to her within less than 10 days before the making of the application.

The orders and decrees of the Superior Court of Cook County of November 5, 1942, November 6, 1942 and March 30, 1943 are affirmed.

ORDERS AND DECREES AFFIRMED.

HEBEL, P.J. AND KILEY, J. CONCUR.

The petition does not comply with the statute and does not show that any of the judges named are prejudiced. Furthermore, under section 9 of the Venue Act a change of venue could not be granted unless the application was made by or with the consent of at least three-fourths of the parties plaintiff or defendant. The application also violated section 6 of the Venue Act, that no change of venue shall be allowed more than 30 days after the return date, unless the party applying shall give to the opposite party 10 days previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than 10 days of the making of the application. The return day was the first Monday of September, 1942. The application was made some time 30 days after the return day on which she was required to appear. She did not give 10 days previous notice of her intention and she did not assert that the knowledge of the prejudice came to her within less than 10 days before the making of the application.

The orders and decrees of the Superior Court of Cook County of November 5, 1942, November 6, 1942 and March 30, 1943 are affirmed.

Orders and decrees affirmed.

McGURN, P.J. and KILEY, J., concur.

42929

322 I.A. 699²

LAURA G. WATSON,
(Plaintiff) Appellant,
v.
GEORGE D. GRAY, et al.,
(Defendants) Appellees.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

754

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an amended complaint filed in the Superior Court of Cook County, Laura G. Watson charged George D. Gray, Edward R. Monroe, Garfield Thompson, Charles J. Monroe and Arthur T. Bermingham with "an unlawful conspiracy which has, and will continue, to cause her great financial loss and damages". She represented that on October 25, 1935 she was the owner of and in possession of real estate in Chicago, improved with a three story and basement modern brick 28 apartment building, yielding an average yearly rental of approximately $14,000; that the fair cash market value thereof at the time of the acts complained of was $80,000; that there were unpaid promissory notes executed by Charles M. Bump and his wife, Belle L. Bump, secured by a trust deed on the premises, to the Continental and Commercial Trust and Savings Bank, as trustee; that the Continental Illinois National Bank and Trust Company became successor to the former bank, as trustee; that the original indebtedness of the Bumps was $62,500, which had been reduced by payments to $49,000; that Mrs. Bump died intestate March 13, 1935, leaving no child or children, nor descendants of any child or children; that Mr. Bump died on May 28, 1937; that they both died leaving an estate sufficient to pay the indebtedness secured by the trust deed; that the holders of the notes were willing to hold in abeyance any foreclosure and to endeavor to collect from the assets of the estate; that defendants knew of such "arrangement" and entered into a conspiracy to buy the notes and to bring a foreclosure suit to forestall the "arrangement" and to deprive plaintiff of her real estate; that in pursuance thereof the defendant Gray negotiated the purchase of the notes; and that

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| LAURA C. THOMSON, | |
| (Plaintiff) Appellee, | |
| v. | |
| GEORGE E. BAUM, et al., | |
| (Defendants) Appellees. | |

MR. JUSTICE SUMNER DELIVERED THE OPINION OF THE COURT.

In an amended complaint filed in the Superior Court of Cook County, Laura C. Thomson charged George E. Orr, Edward S. Monroe, Garfield Thomson, Charles L. Monroe and Arthur T. Sternin here with "an unlawful conspiracy which has and will continue, to cause her great financial loss and damage". She represented that on October 25, 1925 she was the owner of and in possession of real estate in Chicago, improved with a three story and basement modern brick 28 apartment building, yielding an average yearly rental of approximately $14,000; that the fair cash market value thereof at the time of the acts complained of was $[illegible]; that there were outstanding promissory notes executed by Charles A. Baum and his wife, Nellie L. Baum, secured by a trust deed on the premises, to the Continental and Commercial Trust and Savings Bank, as trustee; that the Continental Illinois National Bank and Trust Company became successor to the former bank, as trustee; that the original indebtedness of the Baums was $82,500, which had been reduced by payments to $49,000; that Mrs. Baum died intestate March 17, 1926, leaving no child or children, nor descendants of any child or children; that Mr. Baum died on May 28, 1927; that they both died leaving an estate sufficient to pay the indebtedness secured by the trust deed; that the holders of the notes were willing to wait in abeyance any foreclosure and to endeavor to collect from the assets of the estate; that defendants knew of such "arrangement" and entered into a conspiracy to buy the notes and to bring a foreclosure suit to forestall the "arrangement" and to deprive plaintiff of her real estate; that in pursuance thereof the defendant Orr negotiated the purchase of the notes; and that

at the same time Gray was attempting to prevent the proper ancillary administration of the estate of Charles M. Bump in Michigan. The complaint also charges that Charles M. Bump was aged, had no close relatives and had requested plaintiff to assist and take care of him; that he executed a will in her favor; that to deprive her of the benefits thereof the defendants induced him to change his will and his bequest to her, making other disposition of his property; that after making the later will, it was left with Garfield Thompson, one of the defendants; that Mr. Bump realized his mistake in making it, and being too feeble to go fo it, sent for Thompson to bring the will to him, to be destroyed; that Thompson, carrying out the conspiracy, refused to bring the will to Bump; that Bump died shortly thereafter; that the defendants, well knowing the foregoing, intended to injure the plaintiff and deprive her of her property, and did "confederate and conspire illegally, maliciously and wantonly against this plaintiff". Defendants Edward R. Monroe, Garfield Thompson, Arthur T. Bermingham and George D. Gray entered their appearance and filed their motion to strike the amended complaint and to dismiss on the ground that it did not set forth a cause of action, and that it was barred by prior judgments. These defendants also filed a supporting affidavit pursuant to Section 48 of the Civil Practice Act, stating facts that did not appear on the face of the amended complaint. Plaintiff did not file a counter-affidavit. The court sustained the motion and dismissed the amended complaint. This appeal followed.

Plaintiff asserts that the only question presented is whether the amended complaint states a case of conspiracy. A motion to dismiss admits all allegations well pleaded, but does not admit conclusions of the pleader. Unlawful acts committed in pursuance of a conspiracy, and not the fact of the conspiracy, are the gist

at the same time Gray was attempting to prevent the proper auditory administration of the estate of Charles H. Gray in Michigan. The complaint also charges that Charles H. Gray was aged, had no close relatives and had requested plaintiff to assist and take care of him; that he executed a will in her favor; that to deprive her of the benefits thereof the defendants induced him to change his will and his bequest to her, making other disposition of his property; that after making the later will, it was left with Herfield Thompson, one of the defendants; that Mr. Gray realized his mistake in making it, and being too feeble to go to it, went for Thompson to bring the will to him, to be destroyed; that Thompson, carrying out the conspiracy, refused to bring the will to Gray; that Gray died shortly thereafter; that the defendants, well knowing the foregoing, intended to injure the plaintiff and deprive her of her property, and did "confederate and conspire illegally, maliciously and wantonly against this plaintiff". Defendants Edward H. Hodges, Herfield Thompson, Arthur C. Swartwhem and George L. Gray entered their appearance and filed their motion to strike the amended complaint and to dismiss on the ground that it did not set forth a cause of action, and that it was barred by prior judgments. These defendants also filed a supporting affidavit pursuant to Section 40 of the Civil Practice Act, stating facts that did not appear on the face of the amended complaint. Plaintiff did not file a counter-affidavit. The court sustained the motion and dismissed the amended complaint. This appeal followed.

Plaintiff asserts that the only question presented is whether the amended complaint states a cause of conspiracy. A motion to dismiss admits all allegations well pleaded, but does not admit conclusions of the pleader. Unlawful acts committed in pursuance of a conspiracy, and not the fact of the conspiracy, are the gist

of the action. Unlawful acts causing damage are actionable whether the result of conspiracy or not. In pleading a charge of conspiracy is mere surplusage and only entitled to be looked on as a matter of aggravation. The averment that the parties conspired to do the unlawful act or acts does not change the nature of the action. Dean v. Kirkland, 301 Ill. App. 495. The allegations in effect attempt to charge fraud. Fraud is never presumed. It must be pleaded and proved. Fraud must be shown by the allegation of facts from which it is the necessary or probable inference. Fraud cannot be made out by the profuse interpolation of adjectives characterizing acts alleged to be done as fraudulently done. We are of the opinion that the allegations charging a conspiracy are conclusions unsupported by allegations of specific facts upon which such conclusions rest.

From the facts alleged in the amended complaint, plaintiff was on October 25, 1935 the owner and in possession of the real estate. During their lifetime, the Bumps had executed the notes and trust deed securing the notes. They had also assigned moneys due from land contracts in Michigan as additional collateral security. When they died, their respective estates were liable for the indebtedness. In July, 1937 plaintiff had a discussion with the then holders of the notes to the effect that the moneys from the land contracts would still be applied on the mortgage indebtedness. On May 17, 1938 plaintiff filed her petition in Michigan for ancillary administration of the Charles M. Bump estate. On May 20, 1938, at the time the then holders were willing to hold in abeyance foreclosure against plaintiff's real estate and to hold the notes for payment through the estate, Charles J. Monroe purchased the notes. On May 24, 1938, seven days after plaintiff was in Michigan, Monroe filed a foreclosure in the name of Arthur T. Bermingham. Collecting the notes by means of a foreclosure of the trust deed was of great benefit to the estate by satisfying a possible

of the notes. Unlawful sale has the damage was attributable whether the result of conspiracy or not. In claiming a theory of conspiracy is mere surplusage and only entitled to be looked at as a matter of aggravation. The averment that the petition conspired to do the unlawful act or acts does not change the nature of the action. Lean v. Kirkland, 201 Ill. 499, 506. The allegations in actual attempt to charge fraud. Fraud is never presumed. It must be pleaded and proved. Fraud must be shown by the allegation of facts from which it is the necessary or probable inference. Fraud cannot be made out by the proper introduction of adjectives characterizing acts alleged to be done in fraudulently done. In spite of the rule that the allegations charging a conspiracy are conclusions unsupported by allegations of specific facts from which such conclusions arise.

From the facts alleged in the amended complaint, plaintiff was on October 15, 1932 the owner and in possession of the real estate. During their lifetime, the Bank had secured the notes and trust deed covering the notes. They had also assigned money due from land contracts in Michigan as additional collateral security. When they died, their respective estates were liable for the indebtedness. In July, 1937 plaintiff had a discussion with the then defendants of the notes to the effect that the money from the land contracts would still be applied on the mortgage indebtedness. On May 17, 1938 plaintiff filed her petition in Michigan for ancillary administration of the Charles K. Hoag estate. On May 23, 1938, at the time the loan officers were willing to hold in abeyance proceedings against plaintiff's real estate and to hold the notes for payment through the estate, Charles J. Hoarse purchased the notes. On May 24, 1938, seven days after plaintiff was in Michigan, Hoarse filed a foreclosure in the case of Arthur Berenghem. Collecting the notes by means of a foreclosure of the trust deed was of great benefit to the estate by enforcing a possible

claim. These facts show that the notes were purchased and foreclosure proceedings filed in order to preserve the assets of the estate. There was nothing improper in the act of acquiring the notes by one of the defendants. A person has a right to purchase a mortgage in default and to foreclose such mortgage. Plaintiff had an opportunity to set up any defense that she thought she had in the foreclosure case. She failed to set up any valid defense to the prayer of the plaintiff in the foreclosure case.

Plaintiff also alleged that Bump made a will leaving the residue of his estate to her and that the defendants induced him to make another and different will, depriving her of her expectancy, and that they refused to take the latter will to Bump so that he could destroy it. The amended complaint does not allege that an agent of Bump ever called on Thompson for the will or that Bump intended to destroy it. The statute provides the manner in which a will may be revoked. Plaintiff was nominated and qualified as one of the co-executors of the will and she proceeded to administer the will. If the will was executed through undue influence and if she had any evidence of such, and did not wish the will to be admitted to probate as his last will and testament, it was her duty to object to its admission.

The facts in the supplemental affidavit filed by defendants in their motion to dismiss are taken as true in the absence of a counter-affidavit denying such facts. The affidavit clearly shows that in the case of Bermingham vs. Watson to foreclose the trust deed, the subject matter relating to the purchase of the notes as alleged in the amended complaint, could have been set up by her as a defense to the foreclosure proceeding and that a decree of foreclosure was entered against the defendants in that case, including the plaintiff herein. The affidavit states that plaintiff in the instant case then went to the Federal Court with a petition pursuant to Chapter 12 of the Bankruptcy Act, and having failed to obtain relief, entered

claim. These facts show that the notes were forged and fraudulent proceedings filed in order to preserve the assets of the estate. There was nothing improper in the act of assuming the notes by one of the defendants. A person has a right to purchase a mortgage in default and to foreclose such mortgage. Plaintiff had an opportunity to set up any defense that she thought she had to the foreclosure case, but failed to set up any valid defense to the answer of the plaintiff in the foreclosure case.

Plaintiff also alleges that Sung made a will leaving the residue of his estate to her and that the defendants induced him to make another and different will, depriving her of her inheritance, and that they refused to take the letter will to Sung so that he could destroy it. The amended complaint does not allege that an agent of Sung ever called on Thompson for the will or that Sung intended to destroy it. The statute providing the manner in which a will may be revoked. Plaintiff was nominated and qualified as one of the co-executors of the will and was presented to administer the will. If the will was executed through undue influence and if she had any evidence of such, and did not wish the will to be admitted to probate as his last will and testament, it was her duty to object to its admission.

The facts in the supplemental affidavit filed by defendants in their motion to dismiss are taken as true in the absence of a counter-affidavit denying such facts. The affidavit clearly shows that in the case of Tarnighan, vs. Nelson to foreclose the trust deed, the subject matter relating to the execution of the notes as alleged in the amended complaint, could have been set up by her as a defense to the foreclosure proceeding and that a decree of foreclosure was entered against the defendants in that case, including the plaintiff herein. The affidavit states that plaintiff in the instant case then went to the Federal Court with a petition pursuant to Chapter 12 of the Bankruptcy Act, and having failed to obtain relief, entered

into a contract dated April 11, 1940. The contract shows that the Kalamazoo Citizens Loan & Investment Company, Albertine M. Brown and Dorothy P. Luckie were purchasers of the mortgage notes; that Laura G. Watson had filed her petition in the Federal Court asking that her "petition for arrangement" be dismissed; that she proposed and desired to settle all her differences with the parties who purchased the notes, and contemporaneously with the execution and delivery of that contract conveyed out all her right, title and interest to the real estate, and that all the parties were mutually released of all claims that one may have had against the other. The supporting affidavit also shows that Laura Watson filed her complaint in chancery in the Superior Court of Cook County against Gray, Monroe and Thompson, alleging conspiracy, fraudulent and wrongful acts, or substantially the same subject matter as in her amended complaint herein. Gray answered the complaint. After she submitted all her evidence in the chancery suit the court sustained a motion dismissing the action as to Gray. The statements of fact in this affidavit are uncontradicted. We agree with the defendants that the alleged cause of action is barred because of these prior adjudications and also because of the contract of settlement. The court was right in dismissing the amended complaint. The order of the Superior Court of Cook County entered June 4, 1943 dismissing the amended complaint, is affirmed.

ORDER AFFIRMED.

HEBEL, P.J. AND KILEY, J. CONCUR.

into a contract dated April 17, 1940. The complaint alleges that the Kalamazoo Citizens Bank a Interstate Account, plaintiffs E. Irene and Dorothy F. Dunlap were mortgagees of the mortgage notes; that Irene G. Watson had filed her petition in the Federal Court seeking that her "petition for arrangement" be dismissed; that she recovered and desires to settle all her differences with the parties who purchased the notes, and correspondingly with the execution and delivery of that instrument conveyed out all her right, title and interest in the real estate, and that all the parties were actually released of all claims that one may have had against the other. Her counsel filed also stipulation that Lucy Watson file her complaint in chancery in the Superior Court of Cook County against Inter, Jackson and Thomson, alleging conspiracy, fraudulent and wrongful acts, or substantially the same subject matter as in her amended complaint herein. They answered the complaint. After she submitted all her evidence in the chancery suit the court sustained a motion dismissing the action as to Inter. The statements of fact in this affidavit are uncontradicted. In agree with the defendants that the alleged cause of action is barred because of these prior adjudications and claim therein of the contract of settlement. The court was right in dismissing the amended complaint. The order of the Superior Court of Cook County entered June 4, 1942 dismissing the amended complaint, is affirmed.

ORDER AFFIRMED.

BURKE, P.J. and ETTER, J., concur.

41976

GEORGE B. McLANE, et al.,

Plaintiffs,

v.

LOUIS ROMANO, et al.,

Defendants.

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BARTENDERS & BEVERAGE DISPENSERS UNION, LOCAL 278, OF THE HOTEL AND RESTAURANT EMPLOYEES INTERNATIONAL ALLIANCE, etc., et al.,

Appellants,

v.

ROY D. KEEHN, et al.,

Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

433 155

A

322 I.A. 700

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an unusual proceeding commenced by George McLane, hereafter referred to as McLane, his brother Michael and his brother-in-law William Salvatore against certain defendants, officials of Bartender's Union, Local 278, and others, some of whom are alleged to be "evil disposed" members of the "syndicate", which is alleged to dominate the Union affairs. Decree was in plaintiff's favor, and certain defendants appeal from orders entered subsequent to the decree.

The complaint recites McLane's labor history, his membership in the Local for thirty years and his office as Business Representative for 28 years; the purported history of the growth of the "Capone Syndicate"; history of threats, intimidation, demands and "muscle" resulting in depriving him of control and giving control of the Local to the "syndicate" through officers Romano, Crowley and Panton, who, it is charged are "syndicate" members; that Crowley and Panton are unsavory characters under "syndicate" domination; that these officers have interfered with McLane's

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GEORGE B. MOLANE, et al.,

Plaintiffs,

v.

LOUIS ROMANO, et al.,

Defendants.

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BARTENDERS & DRIVERS BROTHERHOOD UNION, LOCAL 278, OF THE HOTEL AND RESTAURANT EMPLOYEES INTERNATIONAL ALLIANCE, etc., et al.,

Appellants,

v.

ROY D. KLEHR, et al.,

Appellees.

3221.A. 100

MR. JUSTICE KILKENNY DELIVERED THE OPINION OF THE COURT.

This is an unusual proceeding commenced by George Molane, hereafter referred to as Molane, his brother Michael and his brother-in-law William Halvorsen against certain defendants, officials of Bartender's Union, Local 278, and others, some of whom are alleged to be "evil disposed" members of the "syndicate", which is alleged to dominate the Union affairs. Decree was in plaintiff's favor, and certain defendants appeal from orders entered subsequent to the decree.

The complaint recites Molane's labor history, his membership in the Local for thirty years and his office as Business Representative for 20 years; the purported history of the growth of the "Genoese Syndicate"; history of threats, intimidation, demands and "muscle" resulting in depriving him of control and giving control of the Local to the "syndicate" through officers Romano, Crowley and Fanton, who, it is charged are "syndicate" members; that Crowley and Fanton are mere puppets or characters under "syndicate" domination; that these officers have interfered with Molane's

functions as Business Representative and have filed false charges within the Local against him and his co-plaintiffs; and that the conspiracy of defendants and the "syndicate" if permitted to effect its purpose, will result in an irreparable damage to Local members, deprive them of property rights in Union funds, and deprive McLane of his rights in the office of Business Representative. They pray for an accounting, a free election under protection of the court, and an injunction restraining defendants from certain harmful acts.

The temporary injunction issued as prayed the day the suit was filed and no complaint is made thereon. Defendants here, and Romano, after their motions to dissolve the injunction and dismiss the suit were denied, answered denying the material allegations of the complaint and making serious charges against McLane's character and reputation. They also filed a counter-claim charging plaintiffs with conspiracy to obtain control of the Union and conversion of more than $150,000, and ask for an injunction. After plaintiffs had applied for a receiver, both parties agreed to and presented an order for appointment of Harry Ash, receiver of the Local. August 16, 1940, the court appointed Roy D. Keehn receiver, with broad and summary powers over the Union officers and affairs, with directions to make preparations for a free election under supervision of the court and under the Local by-laws. Thereafter the receiver was authorized to employ Charles E. McGuire as his attorney and Maj. Sammis as assistant receiver. The receiver was discharged April 28, 1941, after paying the following authorized fees out of the Local funds: To himself, as receiver, $18,400; Attorney McGuire, $10,000.00; Counsel for Interveners, $2,500.00; and to William J. McCleary, Court Reporter $507.70. The appellees were not parties, but are the persons to whom the allowances were made. Certain defendants defaulted in the trial court, and Romano, who participated in the proceedings are not parties to this appeal.

functions as Business Representative and have filed false charges within the Local against him and his co-plaintiff; and that the conspiracy of defendants and the "dummies" if permitted to effect its purpose, will result in an irreparable damage to local members, deprive them of property rights in Union funds, and deprive McLane of his rights in the office of Business Representative. They pray for an accounting, a free election under protection of the court, and an injunction restraining defendants from certain harmful acts.

The temporary injunction issued as prayed the day the suit was filed, and no complaint is made thereon. Defendants here, and Romano, after their motions to dissolve the injunction and dismiss the suit were denied, answered denying the material allegations of the complaint and making serious charges against McLane's character and reputation. They also filed a counter-claim charging plaintiffs with conspiracy to obtain control of the Union and conversion of more than $80,000, and sue for an injunction. After plaintiffs had applied for a receiver, both parties agreed to and presented an order for appointment of Harry Ash, receiver of the Local. August 16, 1940, the court appointed by D. Kenin receiver, with broad and summary powers over the Union officers and affairs, with directions to make preparations for a free election under supervision of the court and under the local by-laws. Thereafter the receiver was authorized to employ Charles L. McGuire as his attorney and Maj. Samuels as assistant receiver. The receiver was discharged April 28, 1941, after paying the following authorized fees out of the Local funds: To himself, as receiver, $8,400; Attorney McGuire, $10,000.00; Counsel for Intervenors, $2,500.00; and to William L. McClary, Court Reporter $507.70. The appellees were not parties, but are the persons to whom the allowances were made. Certain defendants defaulted in the trial court, and Romano, who participated in the proceedings are not parties to this appeal.

There was a motion made to dismiss the appeal which was denied by the Second Division of this court.

Defendants contend that the order appointing the receiver for the Union is void for want of jurisdiction in that the Local was not a party to the proceeding. The Local is a voluntary unincorporated association. When we speak of the Local we speak of the full membership and its authorized officers and representatives. Before their answer was filed, the trial court denied the petition of the Local, in its name and in the name of defendants as its officers and trustees, leave to intervene or to be made a party. Defendants refer us to Durburow v. Nichoff, 37 Ill. App. 403, where it was decided that directors of a voluntary association suing as plaintiffs, represented the other members. They say plaintiffs had no authority from the Local to sue in a representative capacity and, in fact, sued as individuals and that the defendants were sued as individuals, and that there was no representation of the Local. The Durburow case refers to Whitney v. Mayo, 15 Ill. 251, 255 for the general rule, condensed from Story, Eq. P., 9th Ed. secs. 111 to 135b, where it is said, in substance, that some members of a voluntary association may sue in equity on behalf of all others having a common interest where it appears that those suing fairly represent the interest, and that where their interests differ, some representing each interest should be brought before the court. There seems to be no requirement of authority to sue. It was not necessary here and would not be reasonable in all cases for plaintiffs suing as representatives to have authority to do so. In any event, in the case before us, the complaint states that plaintiffs sue for and on behalf of themselves and all of the members who are too numerous and too far scattered to be made parties. The motion to dismiss was made by the defendants herein, and Romano, who are described in the complaint as officers and members of committees of the Local. Defendants' motions and pleadings which preceded the appointment of the receiver are plainly filed, not as individuals, but as members and officers of the Local. It

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might be said that plaintiffs and defendants represented only special classes of members, and that the thousands of ordinary members were not before the court. Plaintiffs, however, describe themselves as members in their complaint, and if the allegations therein were true, common interests of these ordinary members would be served. Finally, defendants' counterclaim states that the counterclaim is filed on behalf of the defendants as members, officers, agents and representatives of the Union on behalf of themselves and all other members. The trial court in denying the petitions for leave to intervene or be made a party, must have considered that all of the members, and therefore the Local, were already before him by representation. His action was legal. Our conclusion is consistent with Guilfoil v. Arthur, 158 Ill. 600; Bayei v. Rango, 304 Ill. App. 203; Biller v. Egan, 290 Ill. App. 219; United Mine Workers v. Coronado, 259 U. S. 344. The case of United Mine Workers of America v. Bourland, 169 Ark. 796, cited by defendants does not apply for the action there was brought against the Local by name, not against the members.

Defendants proceed to argue that the appointment of the receiver was void because the Local was not a party. We have held that the Local was before the court by representation and there is no further question of the jurisdiction of the parties, and the cases cited by defendants to the point that a receiver should not be appointed for property unless the owners are before the court are, therefore, inapplicable. There is no question of lack of jurisdiction of parties, and, consequently, no question of due process arising therefrom. We have held that the Local, by representation, was before the court. The order appointing the receiver was not void, therefore, for lack of jurisdiction over the Union. Plaintiffs and defendants, before the receiver was appointed, presented to the trial court an order for the appointment of a named person as receiver, based on their stipulation that the best interests of the Union would be served thereby.

might be said that plaintiffs and defendants represented only special classes of members, and that the interests of ordinary members were not before the court. Plaintiffs, however, describe themselves as members in their complaint, and in the allegations therein were some common interests of these ordinary members should be served. Finally, defendants' counterclaim states that the counterclaim is filed on behalf of the defendants as members, officers, agents and representatives of the Union on behalf of themselves and all other members. The trial court in denying the petitions for leave to intervene or be made a party, must have considered that all of the members, and therefore the local, were already before him by representation. His action was legal. Our conclusion is consistent with Guilfoil v. Arthur, 158 Ill. 600; Dayal v. Lemmo, 304 Ill. App. 203; Miller v. Klein, 290 Ill. App. 219; United Mine Workers v. Coronado, 259 U. S. 344. The case of United Mine Workers of America v. Bowland, 189 Ark. 728, cited by defendants does not apply for the action there was brought against the local by name, not against the members.

Defendants proceed to argue that the appointment of the receiver was void because the local was not a party. We have held that the local was before the court by representation and there is no further question of the jurisdiction of the parties, and the cases cited by defendants to the point that a receiver should not be appointed for property unless the owners are before the court are, therefore, inapplicable. There is no question of lack of jurisdiction of parties, and, consequently, no question of due process arising therefrom. We have held that the local, by representation, was before the court. The order appointing the receiver was not void, therefore, for lack of jurisdiction over the Union. Plaintiffs and defendants, before the receiver was appointed, presented to the trial court an order for the appointment of a named person as receiver, based on their situation that the best interests of the Union would be served thereby.

When the trial judge indicated he would appoint a different person, defendants withdrew from the stipulation. They say that, accordingly, the court should have proceeded to hear the issues raised by their answer to the petition for a receiver. A decree entered March 4, 1941, upon a report of the master to whom the cause was referred, found the allegations of the complaint had been proven. The provisions of the decree cover the appointment of the receiver and the performance of his duties. No appeal was taken from the decree and defendants admit in their reply brief that "If the trial court had jurisdiction of the subject-matter, said order and decree are binding upon the parties, * * *". We have found the court had jurisdiction and the decree and its findings are binding on defendants. These considerations dispose of defendants' contentions that a receiver cannot be appointed for a voluntary association because it is not a legal entity, cannot be sued in its own name or be legally served. The appeal is from orders relating only to allowances of fees and costs.

Defendants contend that where defendants have receiverships wrongfully imposed on them, they are absolved of the receivership expense. The decree provided for the payment of fees, costs and expenses out of the Local funds, and binds defendants, as we have found. This consideration disposes of the defendants' contention that the Local was not before the court prior to the filing of petitions for fees and had no opportunity to be heard in connection therewith. The record shows several arguments on petitions of receiver and others with defendants represented and participating. Defendants say the court committed error in not permitting examination of petitioners upon the several petitions for fees, but agree that if the attorneys are entitled to fees at all, out of the Local's treasury, that the schedules of services filed by Attorneys McGuire and Hayes are reasonably

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Defendants contend that where defendants have receivership proceedings imposed on them, they are absolved of the receivership expenses. The decree provided for the payment of fees, costs and expenses out of the local funds, and binds defendants, as we have found. This consideration disposes of the defendants' contention that the local was not before the court prior to the filing of petitions for fees and had no opportunity to be heard in connection therewith. The record shows several arguments on petitions of receiver and others with defendants represented and participating. Defendants say the court committed error in not permitting examination of petitioners upon the several petitions for fees, but agree that if the attorneys are entitled to fees at all, out of the local's treasury, that the schedules of services filed by attorneys McGuire and Guyer are reasonably

sufficient to guide the court in fixing fees. There is objection to some items in the schedule filed by Attorney Lewis and it is argued that he had agreed to accept $7,500 already paid to him in full for his services. Defendants principally complain of the receiver's fees. He filed no time schedule, and no hearing, other than the arguments, was had upon his petition, which would develop the extent of his services. We have read the cases cited and believe that if there was sufficient information upon which the court could exercise reasonable discretion in the matter of the allowance of fees, that no hearing of witnesses was necessary. This question is involved in determining whether there was an abuse of discretion in the fees allowed.

Defendants complain that the fees of the receiver and Attorney McGuire were excessive. According to the schedule McGuire filed, an allowance of $10,000.00 for his fees for services of 857 hours was on the basis of $11.66 per hour. The assumption is justified, from oral statements before the court, that defendants' counsel agree that Attorney McGuire had rendered the services scheduled. We believe that the allowance was fair. As to the receiver's fees, defendants say that $18,400 was exhorbitant measured by any yardstick; that it exceeded the salary for the same time of the judge that presided over the case; and exceeded the percentage generally allowed on the basis of disbursement by the receiver. Both parties cite Heffron v. Rice, 149 Ill. 216 to guide us in determining this question. The court there recommended in determining receiver's fees, that business capacity, integrity and responsibility required in the management of affairs entrusted to the receiver be considered, and that in each case according to its circumstances a reasonable and fair compensation should be allowed. The receiver's services began August 16, 1940 and terminated April 28, 1941. He rendered reports of his acts and doings September 9, October 28, November 18, December, 27, 1940; and January 24, March 11, March 28, 1941. When he took office the Local general funds amounted to about $150,000 and the gross annual income of the Union was well

sufficient to guide the court in fixing fees. There is objection to some items in the schedule filed by Attorney Lewis and it is argued that he had agreed to accept $7,500 already paid to him in full for his services. Defendants principally complain of the receiver's fees. He filed no time schedule, and no hearing, other than the arguments, was had upon his petition, which would develop the extent of his services. We have read the cases cited and believe that if there was sufficient information upon which the court could exercise reasonable discretion in the matter of the allowance of fees, that no hearing of witnesses was necessary. This question is involved in determining whether there was an abuse of discretion in the fees allowed.

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over $200,000. He was charged with the responsibility of supervising the operation and management of all phases of the Union business and with summary power over the officers. The record shows the receiver employed an assistant, Maj. Sammis, whom defendants commend for his industry and who was paid $100 per week. We believe that the court in fixing the receiver's compensation had the right to consider the salaries of the officers of the Local. Romano, Crowley and McLane received $1,000 per month. We believe that in view of the work done by his assistant, an allowance to the receiver of $12,750, under all the circumstances, would be ample compensation. This amounts to about $1,500 per month for the period he served. The court was entitled to take into consideration his knowledge of the character and importance of the case and the nature of the services required. Culver v. Allen Medical Association, 206 Ill. 40. The fixing of fees is largely a matter of discretion and it is not necessary that witnesses be heard if the court has sufficient basis otherwise upon which to exercise its discretion. First National Bank v. LaSalle-Wacker Bldg. Corp., 280 Ill. App. 188. It is evident from the record that the court had ample knowledge of the affairs of the Local and the nature of the services rendered, upon which to determine his fees.

Note

It is next contended that the receiver should not be compensated for any period after November 18, 1940, when he took oath as Chairman of the Illinois Commerce Commission. The basis of the complaint is Ill. Rev. Stats. Chap 111 2/3, Sec. 4 of the Public Utilities Act, which provides that each commissioner shall devote his entire time to his duties, hold no other office or position of profit, nor engage in any other business or employment. The court was advised by the receiver of the appointment and ordered him, nevertheless, because of his knowledge of, and fitness for, the peculiar nature of the receivership, to continue until the further order of court. This is neither the proceeding nor the time in which to test whether the

over $200,000. He was charged with the responsibility of supervising the operation and management of all phases of the Union business and with summary power over the officers. The record shows the receiver employed an assistant, Mr. Symmis, whom defendants commend for his industry and who was paid $100 per week. We believe that the court in fixing the receiver's compensation had the right to consider the salaries of the officers of the local. Thomas, Crowley and Malone received $1,000 per month. We believe that in view of the work done by his assistant, an allowance to the receiver of $2,750, under all the circumstances, would be ample compensation. This amounts to about $1,500 per month for the period he served. The court was entitled to take into consideration his knowledge of the character and importance of the case and the nature of the services required. Culver v. Allen Medical Association, 208 Ill. 40. The fixing of fees is largely a matter of discretion and it is not necessary that witnesses be heard if the court has sufficient basis otherwise upon which to exercise its discretion. First National Bank v. LaSalle-Wacker Bldg. Corp., 290 Ill. App. 188. It is evident from the record that the court had ample knowledge of the affairs of the local and the nature of the services rendered, upon which to determine his fees.

It is next contended that the receiver should not be compensated for any period after November 13, 1940, when he took oath as Chairman of the Illinois Commerce Commission. The basis of the complaint is Ill. Rev. Stats. Chap. 111 2/3, Sec. 4 of the Public Utilities Act, which provides that each commissioner shall devote his entire time to his duties, hold no other office or position of profit, nor engage in any other business or employment. The court was advised by the receiver of the appointment and ordered him, nevertheless, because of his knowledge of, and fitness for, the peculiar nature of the receivership, to continue until the further order of court. This is neither the proceeding nor the time in which to test whether the

receiver violated his oath of office or committed a misdemeanor by continuing to act.

The decree had ordered the allowances paid from the Union funds, and defendants agree that if plaintiffs and interveners by their efforts created or preserved a common fund for the Union members, they are entitled to be paid out of such fund. The decree found that Romano, through the influence of the "syndicate", had control of the Local and by employment of new by-laws was extending his control to its funds; that the suit was instituted by plaintiffs on behalf of the membership of the Local to thwart the efforts of "Lewis, Romano, Frank Nitti and the 'so-called Capone Gang'" who had made efforts to secure and dissipate and to convert to their own use, for their own benefit, all the funds of the Local; that nothing appeared that even tended "to discredit the merit of McLane's complaint" and that matters and things therein alleged in said complaint had been proved. It was alleged that defendants had control of the Union and were about to loot it of large sums of money. No appeal was taken from the decree and we must, accordingly, assume that plaintiffs' action preserved the fund. We believe, therefore, that plaintiffs were properly entitled to $2,500 for their attorneys' fees and, while the appropriate method would be an allowance to the plaintiffs for their attorneys, or as a reimbursement, defendants are not in a position to complain. There are specific findings in the decree that interveners neither directly nor indirectly by their action, preserved the fund but, on the contrary, the court severely criticized their conduct and found their intervention was not in good faith. Obviously, any allowance to them for attorneys' fees on the theory advanced by them cannot stand.

After the injunction had issued and both parties had agreed that the best interests of the Local required the appointment of

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Harry Ash, and after Receiver Keehn had served almost three months, a stipulation to dismiss was filed November 12, 1940, and defendants claim the court was powerless to enter any order but that dismissing the cause. The court of its own motion continued the matter ordered a petition filed giving the basis of the stipulation, allowed interveners to appear and set the hearing for December 5, 1940. The court denied the motion in a Memorandum Order which pointed out the press notice, public interest, the intervening petition, and referred to the motion and brief in support filed by plaintiffs, saying it made no mention of the serious charges respecting Local funds and the alleged misrule of Local affairs. It pointed out that the supervised election alone would not correct the affairs of the Local if other allegations in the complaint were true; and to the charge of the interveners that the stipulation was a sham without the consent of a majority of the 4,000 members. The court finally concluded that a majority of the members of the Union would be prejudiced by dismissal of the cause and a multiplicity of suits ensue and another action likely to enforce the agreement upon which the dismissal was to rest. The agreement was set forth in plaintiffs' petition which recited the resignation of Romano and an arrangement between McLane and Crowley, whereby an agreed slate of offices was to be submitted to the membership and the affairs of the Local stablized. The interveners made serious charges against the good faith of the agreement. The question of dismissal, at the time and under the circumstances, was discretionary with the court, (27 C. J. S. Dismissal and Nonsuit, Sec. 11. p. 164) and abuse of discretion has not been shown. We believe the court exercised its discretion with reason and in a manner not inconsistent with Lee v. City of Casey, 269 Ill. 604 and Rooth v. Kusal, 278 Ill. App. 152. Where the dismissal would tend to prejudice or be unjust or inequitable to the legal rights of others, motions for dismissal may be denied. (27 C. J. S. Dismissal and Nonsuit, Sec. 11, pp. 164, 165). Both parties claimed to represent the entire membership of

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the Local and both alleged their zeal for the protection of the Local and its funds and rights of members; both agreed at one stage that the best interests of the members required a particular receiver and both appeared to agree that a supervised election was essential. Coming on the heels of these agreements, the court was rightfully hesitant, and its action should be viewed as of the time the decision was made and not in retrospect from the subsequent vapid developments. The defendant Crowley who was charged with being an "evil disposed person" of the "syndicate", was found by the decree, after he was elected in the election supervised by the court by a vote of 1182 to 894, to be a person of good character not under the comination of the "syndicate". Strangely, Plaintiff McLane was defeated in the same election by a vote of 1235 to 690.

Complaint was made of the allowances to William J. Cleary, Court Reporter of $507.70. No good reason has been shown for setting aside the allowance.

The order of March 17, 1941, so far as it allows the receiver $18,400 fees, is modified and the receiver's fees are hereby reduced to $12,750; so far as it allows intervener's attorneys fees, it is reversed; and in all other respects it is affirmed. The order of March 22, pertaining to fees of Attorney McGuire and allowance to William J. Cleary, is affirmed. The order of April 28, 1941, so far as it pertains to receiver's fees, is modified to accord with the modification made in the order of March 17, and affirmed as modified; so far as it pertains to intervener's attorneys fees, it is reversed and in all other respects it is affirmed. The order is hereby modified: Affirmed in part and reversed in part.

ORDER MODIFIED: AFFIRMED IN PART
AND REVERSED IN PART.

HEBEL, P.J. AND BURKE, J. CONCUR

the local and both alleged their zeal for the protection of the local and its funds and rights of members; both agreed at one stage that the best interests of the members required a particular receiver and both appeared to agree that a supervised election was essential. Coming on the heels of these agreements, the court was rightfully hesitant, and its action should be viewed as of the time the decision was made and not in retrospect from the subsequent rapid developments. The defendant Crowley who was charged with being an "evil disposed person" of the "candidate", was found by the decree, after he was elected in the election supervised by the court by a vote of 1182 to 894, to be a person of good character not under the domination of the "candidate". Strangely, Plaintiff Adams was defeated in the same election by a vote of 1238 to 890.

Complaint was made of the allowances to William J. Cleary, Court Reporter of $807.70. No good reason has been shown for setting aside the allowance.

The order of March 17, 1941, so far as it allows the receiver $18,400 fees, is modified and the receiver's fees are hereby reduced to $12,750; so far as it allows intervenor's attorneys fees, it is reversed; and in all other respects it is affirmed. The order of March 22, pertaining to fees of Attorney McGuire and allowance to William J. Cleary, is affirmed. The order of April 28, 1941, so far as it pertains to receiver's fees, is modified to accord with the modification made in the order of March 17, and affirmed as modified; so far as it pertains to intervenor's attorneys fees, it is reversed and in all other respects it is affirmed. The order is hereby modified: Affirmed in part and reversed in part.

ORDER MODIFIED: AFFIRMED IN PART AND REVERSED IN PART.

HEBEL, P.J. AND BURKE, J. CONCUR

42473

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| JEANETTE ROHWEDDER,<br>Appellant,<br>v.<br>CITY OF CHICAGO, a municipal corporation,<br>Appellee, | APPEAL FROM<br>CIRCUIT COURT<br>COOK COUNTY. |
| RICHARD O. ROHWEDDER,<br>Appellant,<br>v.<br>CITY OF CHICAGO, a municipal corporation,<br>Appellee,<br>Consolidated Cases. | |

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322 I.A. 700

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with judgment for defendant notwithstanding the verdicts for plaintiffs, totaling $10,000. Plaintiffs appeal.

January 28, 1941, the City installed a concrete safety island 5 inches high in the center of Ridge avenue just west of the west crosswalk of Clark street. In the center was an iron pole, across which, 21½ feet above the street, was an arm which held at each end one 1,000 candle power electric light. The pole was striped alternately with black and white paint to a height of about 6 feet. The pavement of Clark street is about 95 feet wide, while that of Ridge avenue east of Clark street, is 40 feet wide and west of Clark street 60 feet. The opening of West Ridge avenue does not conform in line to east Ridge and the safety island is, accordingly, not bisected equally by the center line of east Ridge extended, but unequally, so that the greater part is on the north side of that line.

42472

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| JEANETTE NOWAKOWSKI, Appellant, v. CITY OF CHICAGO, a municipal corporation, Appellee. | APPEAL FROM CIRCUIT COURT |
| RICHARD O. NOWAKOWSKI, Appellant, v. CITY OF CHICAGO, a municipal corporation, Appellee. | COOK COUNTY. |
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At the time of the accident, traffic control signals were in operation at the intersection and single street lights were burning on the northwest and southwest corners and one of the two lights on the safety island below was burning.

About 1:30 A. M. March 11, 1941, in a heavy snow storm, Richard Rohwedder was driving northwest in Ridge Avenue with his wife at his side in his mother-in-law's car. The car was stopped in obedience to a red light on the east side of Clark street and north of the center line of Ridge avenue. When the light changed Rohwedder's car moved forward in low gear in a straight line and when in the middle of Clark street, he shifted to second speed and, while going about 12 miles an hour the car collided with the safety island and pole described above. Both plaintiffs were painfully injured.

The defendant contends that, as matters of law, plaintiffs were guilty of contributory negligence which barred their recovery and that it was not guilty of negligence; and further that the verdicts are manifestly against the weight of the evidence of its negligence. The trial court allowed defendant's motion for judgments on the ground that plaintiffs were guilty of contributory negligence as a matter of law.

We believe a recital of additional pertinent facts will furnish the basis for resolving these contentions against defendant. Testimony for plaintiff is that nine or ten similar accidents, preceding the instant accident, occurred at the same place involving northwest-bound cars, and that the City was notified of each. Defendant's testimony from the City Police Department, is that only one accident, on February 17, preceded the instant accident. We take the evidence favorable to plaintiff deciding the question of law, and the jury may have done so in deciding the question of fact. There is testimony that the black part of the pole on the safety island, blended with the dark background, and that the pole was blanketed with snow at the

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time of the accident. It is admitted that there was no reflector buttons, or any other cautionary devices installed on the safety island, and that no signs or other instruments warned northwestbound drivers of the differences in the center lines. Plaintiffs say they could see 70 feet ahead and Mrs. Rohwedder said she could see objects in the street. The car was in good running order and the windshield wipers were working. On the question of due care, we believe the evidence that Rohwedder, in the snowstorm, driving west at 12 miles per hour in a straight line, following a course north of the center line of Ridge avenue, with a car in the lane north of him, and with no sensible notice of danger, was not guilty of negligence contributing to the accident which occurred when the car struck a safety island, having no protective warning devices, and a light pole which was blanketed with snow. We think he acted prudently and we can see no way that Mrs. Rohwedder could have helped under the circumstances. She had driven that route before, but not after the safety island was installed.

There is evidence that no warning devices served to caution drivers of the approaching danger; that no reflector buttons or other devices marked the danger; and of the notice of prior accidents. We believe these facts are sufficient to make a prima facie case of defendant's negligence in the light of the requirements that it should have anticipated snowstorms. The cases of Wells v. Village of Kenilworth, 228 Ill. App. 332; O'Connell v. Chicago & North Western R. R. 305 Ill. App. 430; Linneen v. City of Chicago, 310 Ill. App. 274, though somewhat different in facts, have been helpful in this decision.

As to the manifest weight, it is true there is evidence that plaintiffs could see 70 feet ahead and saw objects in the street, but the jury could reasonably conclude that, because of the snow,

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neither the safety island nor pole was visible, although other objects in the street may have been; that there were street lights burning on each corner of the west side of the intersection and one on the center pole and some light from corner places of business, but the jury could find that, because of the corner lights, the center light did not attract attention to the pole blanketed with snow or to the safety island; that though the City plan for construction of the safety island withheld installation of reflector buttons, it should not have, and the City should have known, that the buttons were needed especially in a snow storm; and that the pole was marked with black and white paint, but was blanketed with snow when the accident occurred. We have pointed out sufficient to indicate that the evidence supports the verdict.

Defendant requests that, in the event of our reversal of the judgment, that we direct the allowance of a new trial in its favor. No reason has been shown for a new trial.

The judgment is reversed and the cause is remanded with directions to the trial court to enter judgment upon the verdicts in favor of the plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND BURKE, J. CONCUR.

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REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND BURKE, J. CONCUR.

42481

322 I.A. 701

HERMAN ROTHENBERG,

Appellant,

v.

LESTER L. SEIFRIED, HOWARD F. BISHOP, PHILLIP C. LINDGREN, et al.,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

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MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This action was commenced May 17, 1941, as a representative suit by one of the beneficiaries of a real estate liquidation trust to restrain the sale of trust property and for an accounting from and removal of the Trust Managers. Defendants answered that the sale was abandoned. Plaintiffs thereafter, by leave of court, filed a "supplemental amendment" to the complaint, praying for a sale of the trust property by the court and an accounting. July 9, 1942, the court on defendant's motion dismissed the suit as to Bishop, Lindgren and Seifried and plaintiff appeals.

Under the trust agreement defendants Bishop, Seifried and Bills were trust managers, with power and discretion to direct the American National Bank and Trust Company of Chicago, trustees. Plaintiff originally charged a conspiracy among the defendants to sell the trust property to Seifried at a depressed value following their acquisition of enough units of beneficial interest to thwart the privilege given in the trust agreement to the holders of 34% of the units to reject an offer of sale; payments of illegal commissions to Bills Real Estate Company and the inducement of a proposed broker's commission on the sale to him to refrain from serious objections to the proposed sale; their pretended good faith

42481

HERMAN ROTHENBERG,

Appellant,

v.

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Under the trust agreement defendants Bishop, Seifried and Lille were trust managers, with power and direction to direct the American National Bank and Trust Company of Chicago, trustee. Plaintiff originally charged a conspiracy among the defendants to sell the trust property to Seifried at a depressed value following their acquisition of enough units of beneficial interest to thwart the privilege given in the trust agreement to the holders of 34% of the units to reject an offer of sale; payments of illegal commissions to Lille Real Estate Company and the indorsement of a proposed broker's commission on the sale to him to refrain from serious objections to the proposed sale; their pretended good faith

notice to beneficiaries giving apparent full disclosure to circumstances of the sale, such as identity of Seifried as offeror, comparison of his offer with the tax value and independent appraisal or recital of income and profit and condition of sale; that more than $8,000 should first be spent on improvements and that a $2500 broker's commission would be paid, and that Bills considered the offer insufficient and neither approved nor disapproved; and their scheme to defraud the beneficiaries by their false and unworthy pretense in calling upon the beneficiaries to read the notice and contents carefully and to consult others before deciding whether to approve or disapprove the sale when, at the time of notice, the trust managers knew well that the beneficiaries were impotent to reject the offer since defendants then controlled 70 per cent of the units. On the basis of these charges plaintiff asked that the sale be prevented and an accounting, and removal of the defendants as Trust Managers.

Seifried filed a special appearance and no answer, but Bills, Bishop and Lindgren answered and showed that the sale was abandoned because more than 34 per cent of the unit holders had objected. Plaintiff then filed his second pleading, charging that Bishop and Lindgren were co-conspirators, owners of more than 34 per cent, had caused the offer to be rejected, not in good faith, but to defeat the action; that Seifried had refused in a deposition to disclose the circumstances of the Trust Manager's actions in connection with the "sale" and was not a suitable manager and should be removed; that a new course had been adopted by the conspirators to accomplish their purpose in conformity to which Seifried had purchased and was attempting to purchase units on the basis of the rejected offer without full disclosure, and that defendants had information which they had used and were using to enrich themselves at the expense of the beneficiary; that because defendants had

notice to beneficiaries giving apparent full disclosure to circumstances of the sale, such as identity of Saltried as offeror, comparison of his offer with the tax value and independent appraisal or rental of income and profit and condition of sale, that more than $8,000 should first be spent on improvements and that a $2500 broker's commission would be paid, and that Bills considered the offer insufficient and neither approved nor disapproved; and their scheme to defraud the beneficiaries by their false and unworthy pretense in calling upon the beneficiaries to read the notice and contents carefully and to consult others before deciding whether to approve or disapprove the sale when, at the time of notice, the trust managers knew well that the beneficiaries were impotent to reject the offer since defendants then controlled 70 per cent of the units. On the basis of these charges plaintiff asked that the sale be prevented and an accounting, and removal of the defendants as Trust Managers.

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acquired more than 51 per cent of the units, plaintiff and those similarly situated were without the protection of the remedies given under the Trust Agreement; that although the Trust Managers were permitted under the agreement to buy units, they should not be permitted to do so in violation of their trust; and that under the agreement a unit holder may sue for approval, by the court, of audited statements of income and expenses. He prayed for an accounting of unit purchases by defendants, for a sale by the court to the highest bidder, and disbursal to the beneficiaries of any illegal profits made by purchase of units in violation of trust, and an accounting of the receipts and disbursals to be submitted for the court's approval.

Siefried withdrew his special appearance and joined in a motion by defendants to "Strike The Supplemental Amendment to the Complaint". They argue that the motion was directed against both pleadings and the order of dismissal sustained the motion "to strike and dismiss the said complaint and the said supplemental amendment * * *." The motion was limited to plaintiff's second pleading, for defendants, by answering the original pleading, waived their right to object and the answer was not withdrawn when the motion to strike was filed. Defendants, however, say a trial should not be had on the complaint because plaintiff's suit cannot be maintained as a representative action. The point goes to the jurisdiction of the court over persons and was not waived by failure to object in the trial court.

An allegation that a suit is brought in a representative capacity, is not sufficient to bring those not actually named parties, before the court. The pleadings must show that plaintiff and those whom he seeks to represent, have a common interest, in order that

acquired more than 51 per cent of the units, plaintiff and those similarly situated were without the protection of the remedies given under the Trust Agreement; that although the Trust Managers were permitted under the agreement to buy units, they should not be permitted to do so in violation of their trust; and that under the agreement a unit holder may sue for approval, by the court, of audited statements of income and expenses. He prayed for an accounting of unit purchases by defendants, for a sale by the court to the highest bidder, and disbursal to the beneficiaries of any illegal profits made by purchases of units in violation of trust, and an accounting of the receipts and disbursals to be submitted for the court's approval.

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An allegation that a suit is brought in a representative capacity, is not sufficient to bring those not actually named parties before the court. The pleadings must show that plaintiff and those whom he seeks to represent, have a common interest, in order that

a multiplicity of suits may be avoided. It is apparent from the complaint that plaintiff seeks to represent all unit holders, other than defendants, and also others who have sold their units. Some unit holders, even if they were fully advised by defendants, might, for reasons of their own, have wished to accept the offer to purchase. Some might now wish to sell their units to Seifried on the basis of that offer - some may not wish now to sell the trust property. These possible differences and desires of beneficiary compel the decision that plaintiff cannot sustain this action as representative of those whom he seeks to represent. Langson v. Goldberg, 373 Ill. 297; Otto v. Alexander, 383 Ill. 482. Plaintiff must be held to have sued for himself only. For this reason it is unnecessary for us to consider the arguments and colloquy which preceded the order of dismissal when plaintiff's counsel insisted upon a list of the names of unit holders so that he could advise them what he was doing.

The "Supplemental Amendment" did not, as defendants claim, supersede the original complaint; it was merely an addition to it and we should consider both as a single pleading on this motion. 41 Amer. Juris. Sec, 264, 267; Miller v. Cook, et al, 135 Ill. 190; Story's Eq. & Pl. 9th Ed., Sec. 332, 336. Defendants' motion to strike, admitted the truth of the allegations well-pleaded. In the "Supplemental Amendment" in addition to making allegations as "representative", plaintiff alleged that under the trust agreement, any unit holder may sue to have the trustee managers submit audited statements of income and expenses presented for approval by the court. This allegation is not attacked in defendants' motion. In the complaint in addition to the relief sought as "representative", plaintiff asks that Bills, Seifried and Bishop be required to account, and that they be removed as Trust Managers and a receiver be appointed. Reference to the substance of the complaint hereinbefore recited shows that enough is charged against the conduct of the Trust Managers to warrant

a multiplicity of suits may be avoided. It is apparent from the complaint that plaintiff seeks to represent all unit holders, other than defendants, and also others who have sold their units. Some unit holders, even if they were fully advised by defendants, might, for reasons of their own, have wished to accept the offer to purchase. Some might now wish to sell their units to Smithfield on the basis of that offer - some may not wish now to sell the trust property. These possible differences and desires of beneficiary consent the decision that plaintiff cannot sustain this action as representative of those whom he seeks to represent. Dawson v. Goldberg, 273 Ill. 297; Otto v. Alexander, 358 Ill. 482. Plaintiff must be held to have sued for himself only. For this reason it is unnecessary for us to consider the arguments and colloquy which preceded the order of dismissal when plaintiff's counsel insisted upon a list of the names of unit holders so that he could advise them what he was doing.

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a hearing on the question of their fitness to serve as Trust Managers and to compel them to account to the court for their receipts and disbursals as managers of the property. We must assume that this last remedy is given in the trust agreement, to any unit holder. Plaintiff owns 5 of the 1040 units. We believe the court erred in striking the entire pleadings.

While the allegations in plaintiff's pleadings purport to be brought as a representative of all beneficiaries, they also have a direct bearing upon the relief for which he asks and appears to be entitled to ask as an individual. These allegations do not pertain to Lindgren since he is not a Trust Manager. Plaintiff's prayers for relief in both pleadings, so far as they pertain to relief for all beneficiaries, may be disregarded.

For the reasons given hereinabove, the decree is reversed and the cause is remanded with directions to the court to rule upon Bishop, whose answer to the original complaint stands, to answer the allegations in paragraph 10 of the "Supplemental Amendment" and upon Seifried to answer the original complaint as bearing upon his fitness to serve as Trust Manager, and allegations in paragraph 10 of the "Supplemental Amendment" and that the court proceed to try the issues thus made.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND BURKE, J. CONCUR.

a bearing on the question of their fitness to serve as Trust Managers and to compel them to account to the court for their receipts and disbursements as managers of the property. We must assume that this last remedy is given in the trust agreement, to any unit holder. Plaintiff owns 5 of the 1040 units. We believe the court erred in striking the entire pleadings.

While the allegations in plaintiff's pleadings purport to be brought as a representative of all beneficiaries, they also have a direct bearing upon the relief for which he asks and appears to be entitled to ask as an individual. These allegations do not pertain to Lindgren since he is not a Trust Manager. Plaintiff's prayers for relief in both pleadings, so far as they pertain to relief for all beneficiaries, may be disregarded.

For the reasons given hereinbefore, the decree is reversed and the cause is remanded with directions to the court to rule upon Nixon's to answer the allegations in paragraph 10 of the "Supplemental Amendment" and upon Plaintiff to answer the original complaint as bearing upon his fitness to serve as Trust Manager, and allegations in paragraph 10 of the "Supplemental Amendment" and that the court proceed to try the issues thus made.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND BURKE, J. CONCUR.

322 I.A. 702

42521

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| LOUISE CRYSTAL CHRISTOFFERSON, Appellant, v. GENERAL MOTORS CORPORATION, a corporation, Appellee. | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for damages for breach, by General Motors Corporation, of an alleged "contract duty" to decedent and plaintiff, his widow and administratrix of his estate, and, beneficiary under a group insurance policy issued by the Metropolitan Life Insurance Company to General Motors. The action was dismissed as to Metropolitan, and from a judgment for General Motors, plaintiff has appealed.

Decedent Arthur F. Christofferson was employed by the General Motors Corporation in 1921 and served as a salesman with its Cadillac Motor Car Division in Chicago until November 1, 1936, when he was promoted to Assistant Sales Manager. In 1928 General Motors entered into a group insurance contract with Metropolitan under which General Motors' employees could avail themselves of insurance benefits by applying therefor, according to a schedule based on their income from General Motors. Prior to March 16, 1937, decedent was owner of a $2,000 group insurance policy, to which he was entitled as a salesman, but on that date, pursuant to his promotion and his application for the increased insurance, a $20,000 group insurance policy issued to him. Both of these policies carried a "Conversion Privilege" clause which provided, "In case of termination of the employment of the employee for any reason whatsoever", the group insurance in his favor would cease, but if he applied

322LA. 102

42521

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Decedent Arthur T. Christoffersen was employed by the General Motors Corporation in 1921 and served as a salesman with its Cadillac Motor Car Division in Chicago until November 1, 1926, when he was promoted to Assistant Sales Manager. In 1928 General Motors entered into a group insurance contract with Metropolitan under which General Motors' employees could avail themselves of insurance benefits by applying therefor, according to a schedule based on their income from General Motors. Prior to March 16, 1927, decedent was owner of a $2,000 group insurance policy, to which he was entitled as a salesman, but on that date, pursuant to his promotion and his application for the increased insurance, a $20,000 group insurance policy issued to him. Both of these policies carried a "Conversion Privilege" clause which provided, "In case of termination of the employment of the employee for any reason whatsoever", the group insurance in his favor would cease, but if he applied

within 31 days "after such termination", he was entitled to obtain, on payment of the required premium, an individual policy equal to, or less than, his group policy at his option. In his application for those two policies and for a further group policy, hereinafter referred to, decedent authorized General Motors to deduct his cost of the insurance each month from his pay. The larger policy was in effect in May, 1937, when decedent suffered a paralytic stroke and on July 1, 1937, when he was informed by General Motors that thereafter he would no longer be employed as assistant sales manager but as a salesman. He returned to his place of employment in July, 1937, applied for a $2,000 group policy, which was the limit for salesmen, and worked on and off as a salesman thereafter, until March, 1938. Though frequently requested to do so, decedent failed to surrender the $20,000 policy and finally refused to do so and, December 27, 1937, General Motors wrote decedent sending him the $2,000 policy for which he had applied in July 1937, and advised him that it superseded the larger policy which decedent then held. The last policy issued recited on its face that it was for $2,000, effective July 1, 1937, and voided any group policy theretofore issued. It appears that following July 1, 1937, decedent and plaintiff discussed with an agent of Metropolitan, the question of conversion, for on August 11, 1937 the agent's superior directed a written inquiry to the Home Office of Metropolitan with respect to the conversion privileges on the $20,000 policy, and on August 31, 1937 the inquiry was answered in a letter which advised that decedent's employment had only been changed, not terminated, and that decedent was not entitled to convert the $20,000 group policy to an individual policy of equal amount. March 25, 1938, he applied for disability benefits under this policy - there were no such benefits under the larger policy - and received $182 up to May 31, 1938, at the rate

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of $14 per week. He died July 28, 1938, and October 28, 1938, plaintiff collected $2,012 death benefits under the last policy.

Plaintiff's position, judged from the pleading on which the trial was had and a colloquy between court and counsel at the time of the court's decision and upon motion for a new trial, is that decedent's employment was terminated July 1, 1937, and that because General Motors was decedent's agent in deducting premiums from his pay and knew or should have known, that he was mentally incompetent on July 1, 1937 and thereafter, owed him and plaintiff a duty to advise him or her in due time by a letter or otherwise of his conversion option, and to help them gain and protect his conversion rights. It is for breach of this alleged duty that this action is brought.

The essence of plaintiff's contention is plainly decedent's mental competence, for if he were competent on July 1, 1937 and during the 31 days thereafter, while in possession of two group policies each containing the "Conversion Privilege" clause, it could not be seriously contended that General Motors, assuming for this purpose but not deciding that it was his agent, was obliged to construe the clause for him, since he could do so himself; or explain what his rights were thereunder since his own thinking would have been sufficient for the purpose; or to discharge him in order to give rise to a conversion right, since it would be assumed he would have understood that he could gain the right by resigning. The trial court found that decedent's mental incapacity to deal with this transaction was not proven; that even if he were incompetent on July 1, 1937, he recovered sufficiently in ample time to permit him to acquire any right offered under the conversion privilege clause.

of $14 per week. He died July 26, 1952, and October 28, 1952, plaintiff collected $2,000 death benefits under the last policy.

Plaintiff's contention, judged from the pleading on which the trial was had and a conference between court and counsel at the time of the court's decision and upon motion for a new trial, is that decedent's employment was terminated July 1, 1927, and that because General Motors was decedent's agent in deducting premiums from his pay and knew or should have known, that he was mentally incompetent on July 1, 1927 and thereafter, and his and plaintiff's duty to advise him or her in due time by a letter or otherwise of his conversion option, and to help them gain and protect his conversion rights. It is for breach of this alleged duty that this action is brought.

The essence of plaintiff's contention is plainly decedent's mental competence, for if he were competent on July 1, 1927 and during the 31 days thereafter, while in possession of two group policies each containing the "conversion privilege" clause, it could not be seriously contended that General Motors, assuming for this purpose but not deciding that it was his agent, was obliged to construe the clause for him, since he could do so himself; or explain what his rights were thereunder since his own thinking would have been sufficient for the purpose; or to discharge him in order to give rise to a conversion right, since it would be assumed he would have understood that he could gain the right by resigning. The trial court found that decedent's mental incapacity to deal with this transaction was not proven; that even if he were incompetent on July 1, 1927, he recovered sufficiently in ample time to permit him to acquire any right offered under the conversion privilege clause.

Emmons, decedent's brother-in-law, said that when decedent talked to General Motors July 1, he was very nervous, incoherent and inarticulate and that at Emmons wedding July 10, he was quite good "off and on" and would say "I cannot articulate". Mrs. Emmons testified that after the July 1 telephone conversation, decedent seemed unusually confused and was "inarticulate and slow and halting and hesitant in speech" and that July 10 his condition was not improved. A physician who had treated and observed decedent gave testimony - of, and an opinion upon, decedent's incompentency - which the court, who had observed the witness, discredited as vague and not too reliable. Another witness testified to the partial paralysis of decedent following the stroke and that his speech and memory were poor thereafter and that in April or May 1938 decedent could not grasp the witnesses' effort to purchase a car from him. Against this evidence was the testimony that in the July 1 conversation decedent spoke intelligently, and his speech was coherent; that he was taken to the train in Springfield and returned alone to Chicago where his wife met him; that in the period between his return to work in July and the cessation of his work in the Spring of 1938, sales of 27 cars were credited to him and his earnings were in excess of $1,000, and that he worked on and off during that period as a salesman; that he discussed his insurance or conversion privilege clause with an insurance agent in August 1937; that he applied for the last group policy in July, 1937 and refused to deliver up the $20,000 policy in December, 1937 and stated that after his death the law would take its course upon that policy; that in November, 1937 he went to a funeral service, alone, on the "elevated". In considering this testimony, it is important to remember that decedent was partially paralyzed as a result of the stroke he suffered in May, and that the question was as to his mental

Simons, deceased's brother-in-law, said that when deceased talked to General Motors July 1, he was very nervous, incoherent and inarticulate and that at Simons wedding July 10, he was quite good "off and on" and would say "I cannot articulate". Mrs. Simons testified that after the July 1 telephone conversation, deceased seemed unusually confused and was "inarticulate and slow and halting and hesitant in speech" and that July 10 his condition was not improved. A physician who had treated and observed deceased gave testimony - of, and an opinion upon, deceased's incompetency - which the court, who had observed the witness, discredited as vague and not too reliable. Another witness testified to the partial paralysis of deceased following the stroke and that his speech and memory were poor thereafter and that in April or May 1938 deceased could not grasp the witnesses' effort to purchase a car from him. Against this evidence was the testimony that in the July 1 conversation deceased spoke intelligently and his speech was coherent; that he was taken to the train in Springfield and returned alone to Chicago where his wife met him; that in the period between his return to work in July and the cessation of his work in the Spring of 1938, sales of 27 cars were credited to him and his earnings were in excess of $1,000, and that he worked on and off during that period as a salesman; that he discussed his insurance or conversion privilege clause with an insurance agent in August 1937; that he applied for the last group policy in July, 1937 and refused to deliver up the $20,000 policy in December, 1937 and stated that after his death the law would take its course upon that policy; that in November, 1937 he went to a funeral service, alone, on the "elevated". In considering this testimony, it is important to remember that deceased was partially paralyzed as a result of the stroke he suffered in May, and that the question was as to his mental

capacity. We believe that we have pointed out sufficient conflicting testimony to show that the court was justified in its conclusion that decedent was not mentally incompetent on July 1, 1937 or during the 31 days thereafter. We need not consider any other point for since we confirm the court's decision on the question of decedent's incompetency, plaintiff's other contentions fall.

The judgment of the Municipal Court is hereby affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

capacity. We believe that we have pointed out sufficient conflicting testimony to show that the court was justified in its conclusion that decedent was not mentally incompetent on July 1, 1927 or during the 21 days thereafter. We need not consider any other point for since we sustain the court's decision on the question of decedent's incompetency, plaintiff's other contentions fail.

The judgment of the municipal court is hereby affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

322-702

Abstract

322 I.A. 702

Gen. No. 9926 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1944

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|---|---|
| WILLIAM SPARS, Administrator of the Estate of JULIA SPARS, Deceased, Plaintiff-Appellant, vs. AMELIA WERTH and WILLIAM WERTH, Defendant-Appellee. | Appeal from Circuit Court DuPage County |

175

Dove--P.J.:

This is an appeal from an order of the circuit court of DuPage County granting a motion of appellees for a new trial in a suit against them by the administrator of the estate of Julia Spars, deceased, on two alleged promissory notes. The trial was by a jury, resulting in a verdict against appellees for $10,250.00.

Appellees are husband and wife, Amelia Werth being a daughter of the decedent. The suit is predicated upon two alleged notes, not produced in evidence, which appellant claims were among the decedent's papers and which were taken by decedent in September 1941 to the home of Amelia Werth, where she remained until her death on November 2nd of that year. One of the notes is alleged to be for $8200.00 dated July 21, 1934, and the other for $500.00 dated November 14, 1935, each

due five years after its date, payable to the order of the decedent and executed by appellees. Appellees deny that either of the notes ever existed.

The decedent, a widow, left surviving her six children, including appellant, who is administrator of her estate, Olga Baltes, Selma Baltes, Minnie Russell, Hattie Seiffert, and appellee, Amelia Werth. Appellant testified that he was present when the notes were executed by Mrs. Werth; that her husband's name was on the notes at that time and that he was sitting outside in his car; that the witness had drawn the money for his mother from the Peoples Stock Yards State Bank on June 9, 1931, because there was a run on the bank and banks were failing; that his mother thereafter kept the money amounting to between $15,000.00 and $18,000.00 in a pickle jar under the candy counter; that he saw her count it out to Mrs. Werth on each occasion; that shortly after his mother's death he went to Mrs. Werth's home for his mother's papers, and was told by Mrs. Werth that she did not know where the notes and her mother's will were; that on November 16th, 1941, accompanied by Mrs. Russell and Mrs. Seiffert, he went there again, at which time Mrs. Werth said that her husband had taken the will to his attorney to look it over; that they talked about the $8700.00 and Mrs. Werth said that her husband was going the next morning to see about getting a loan; that she also said she owed appellant and Hattie and Minnie $2000.00 each, and that if he told Olga and Selma "we will get that much less;" and that next day at the Werth store, she told him and Mrs. Seiffert: "Get out of here, I don't owe you anything. Take it to court, you have nothing to show for it." Mrs. Seiffert corroborated the administrator as to the last two conversations. Mrs. Russell testified that she was present at the conversation on November 16th, 1941 and that in response to her brother's statement that he had come to see how much money

was left after the funeral, Mrs. Werth said she had not figured it up yet, and that that was all the witness remembered; that she heard Mrs. Seiffert testify that Mrs. Werth said she owed them $2000.00 each, but did not hear her say that it took place on November 16, 1941. On cross examination, appellant first denied that he demanded $2000.00 from Mrs. Werth for himself and a like amount for Mrs. Seiffert, but later admitted that he made such a demand. Mrs. Werth denied telling appellant that her husband had taken the decedent's will to a lawyer for examination. She testified that appellant said he came to find out about the estate and that she told him she had $645.00 which her mother had given her, but that she did not have the funeral bill and other bills; that later that evening he called her by telephone and said that he was coming the next day for the $4000.00 and that if he did not get it somebody would be shot; and that the next day at the store after a wordy altercation, she called the police, and appellant and Mrs. Seiffert then left.

Appellees denied signing either of the notes, and denied being at the decedent's home or receiving any money from her on the date of either of the notes, or at any time thereabouts. They reside at Westmont, and the decedent lived in Chicago. Mr. Werth is in the hardware business, and in 1931 was vice president of the First State Bank of Westmont. Albert A. Brachman, cashier of the bank in 1931, and now its vice president and cashier, testified that on July 29, 1931, the decedent left with him a note and mortgage for $3200.00 and a check for $5000.00 on the First State Trust and Savings Bank, Chicago, which was credited to her account, and that on the same day, at the request of Mrs. Werth and the decedent, he drew another note for $8200.00 due five years after its date, payable to bearer, and a trust deed securing the same to the Chicago Title and Trust Company, as trustee, both of which were executed

by appellees; that he delivered both of them to the decedent and that she was the owner thereof. He also identified an extension agreement drawn by him and executed by appellees on July 29, 1936. The $8200.00 note and the extension agreement are marked in the German language as paid, in the hand-writing of the decedent. Some of the coupon interest notes are likewise marked, and others are marked paid through the Westmont bank. Mrs. Werth testified that her mother gave her the $8200.00 note as a gift. Appellant admitted testifying in the probate court of Cook County, on October 28, 1942, that "at that time in 1934 and 1935" appellees were "already" indebted to the decedent in the amount of the $8200.00 secured by the trust deed.

Over appellees' objection Mrs. Augusta Henning, a cousin of the decedent, was permitted to testify that on July 6, 1941, while she was visiting the decedent in Chicago, the decedent told her, while they were alone, that "she had a will and borrowed Amelia the money $8,875.00 and that she was on three notes and paid interest." On cross-examination she testified: "One note was for $8000.00, the second $500.00 and the third $375.00. Julia Spars did not tell me when she loaned this money. Julia did not tell me what kind of a note she had as security for these loans." In his argument to the jury appellant's counsel commented extensively upon this testimony and its favorable aspect to appellant. In view of the conflict between the testimony of the interested parties, it is apparent that the testimony of Mrs. Henning and the impressive argument of counsel for appellant concerning it, may well have been the deciding factor with the jury.

Such testimony as to alleged statements of a decedent is self serving and inadmissible. (Oswald v. Nehls, 233 Ill. 438, 444; Dean v. Dean 286 Ill. 23, 28), and is incompetent as hearsay. (Patterson v. Patterson, 251 Ill. 153, 165).

Appellees did not waive the right to question the competency of such testimony by producing another witness who testified that on a different occasion the decedent told her she had very little money left by the time she had her doctor bills and funeral expenses paid, and that she had a house and lot in Chicago that was supposed to be divided together with her money, between her children. Authorities cited by appellant to the affect that where a party objects to a particular conversation but later offered testimony concerning the same conversation have no application here.

Appellant's claim that gifts from a parent to a child will be carefully scrutinized, and that the testimony does not establish such a gift in this case by clear and convincing evidence has nothing to do with the issues made by the pleadings.

The trial court granted the motion for a new trial because of the incompetency of the testimony of Mrs. Henning and its employment in the argument of appellant's counsel to the jury. The order granting the motion was correct, and that order is affirmed.

Order affirmed.

Abstract

Gen. No. 9949 Agenda No. 8

In the Appellate Court of the
State of Illinois
Second District
February Term, 1944

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| Walter Fitch, a minor, by his next friend, Beulah Fitch, Appellant, | Appeal from Circuit Court of Winnebago County |
| v. | |
| Charles W. Thompson, as Trustee of the Chicago and North Western Railway Company, a corporation, and Sam Smith, Appellees. | |

Dove, P. J.:

322 I.A. 703

Appellant sued appellees in the circuit court of Winnebago County to recover damages for injuries received in a collision between one of the trustee's passenger trains and a truck driven by appellant. The defendant Sam Smith was the engineer on the locomotive of the train. The issues made by the pleadings were submitted to a jury and at the close of the testimony each of the defendants filed a motion for a directed verdict, the ruling upon which was reserved. The jury returned a verdict against the trustee for $7500.00, and finding the defendant, Sam Smith, not guilty. The trustee filed a motion for a new trial. Conformably to the provisions of section 68 of the Civil Practice act, (Ill. Rev. Stat. 1943, Chap. 110, par. 192), the court granted the motions for a directed verdict and for judgment notwithstanding the verdict and entered judgment for the trustee notwithstanding the verdict. Pursuant to Rule 22 of the Supreme Court, (Ill. Rev. Stat. 1943, chap. 116, par. 259.22) the court also granted the motion for a new trial, which latter action is ineffective unless the granting of the motion for judgment notwithstanding the verdict is reversed. Therefore the initial question is whether the court correctly granted

the motion for judgment notwithstanding the verdict. This necessitates an examination of the testimony.

The accident occurred on January 20, 1942, about 11:30 A. M. at the village of Roscoe, where the railroad, running north and south, crosses a gravel surface highway known as the "Elevator Road", at approximately right angles. A switch track joins the main track at a point about 200 feet south of the highway and extends northerly and about 10 feet west of the main track across the highway to service the lumber and coal sheds of a lumber company adjacent to the west side of the railroad right of way and north of the highway. On the south side of the road there is another lumber shed, the east end of which is about 50 feet west of the main track of the railroad. On the west side of the railroad and the south side of the highway, there is a standard circular railroad crossing sign about 300 feet west of the main track, and on the same side of the county road about 20 or 30 feet west of the track is a large rectangular "Look out for the cars" sign, on the post of which there is also a semi-circular stop sign. In the southeast quadrant of the intersection there is an automatic crossing bell, and a standard crossbuck warning sign in the northeast quadrant of the intersection.

The day was cool, clear and bright, and it was not freezing. The train was a passenger train known as the "Viking", traveling on time on a regularly scheduled run, and approached the crossing from the south at a speed of sixty to seventy miles per hour, as appellant, driving an open bodied truck, accompanied by his father, came from the west on the road, and stalled on the crossing.

Appellant testified that he did not remember the accident and that prior thereto his health was perfect; that he had crossed the crossing a dozen times and had crossed it five times

" recently", within a period of several days. The only other occurrence witness for appellant was Edward Thomas, who testified that as he was driving his car south from an intersecting lane onto the Elevator Road enroute to the lumber yard, he first noticed the train when he was about 120 to 150 feet from the railroad track; that after he turned onto the Elevator Road he saw appellant's truck approaching from a point about 170 to 180 feet west of the main track; that he, the witness, stopped his car about 23 feet east of the railroad track; that the crossing was level, but the road declines slightly on the east side of the track and there were some deep holes in the highway tracks west of the railroad where cars continually bounced; that some distance back from the crossing appellant's truck was traveling at not to exceed 10 to 15 miles per hour, slowing down to about 4 miles per hour when it passed the offices of the elevator company about 70 feet back west of the crossing, and that by the time it reached a point opposite the east end of the lumber shed on the south side of the highway it had slowed down to about one mile per hour, and when it got into the open space east of the lumber shed it was just barely moving; that it made a little jump when the front end went into a hole between the tracks, but it did not lurch ahead, and just kept easing onto the track; and that after it got onto the track the wheels spun, throwing dirt across where the witness had stopped. On direct examination he testified that when the truck came onto the railroad track the locomotive was "a good half mile" from the intersection, running about 60 to 70 miles per hour. On cross-examination he testified that when he, the witness, stopped for the crossing the train was a little more than half a mile up the track and that at that time the truck was 100 feet west of the track. He further testified that there was no bell ringing when he came to a stop, and that no

whistle was blown and no bell was rung on the train before the collision, and that he saw no evidence of brakes on the train being applied; that when the train stopped, the locomotive was a half mile north of the crossing; that he was near the automatic signal when the train backed up across the crossing, at which time the crossing bell was not ringing, and that he saw men working on it later in the day.

Six witnesses, for appellees, including the engineer and firemen, testified the train whistled for the crossing, and the latter two witnesses testified the bell had been ringing continuously ever since they left Harvard. An employee of the lumber company testified the crossing bell was ringing when a car was spotted at about 9:30 A. M. that day. The post master and the manger of the lumber company each testified they saw the train before the accident, heard it whistle and that the crossing bell was ringing. Another employee of the lumber company testified that he was on the north side of the highway, saw the train coming, heard it whistle and saw the truck coming approximately 60 or 70 feet back from the track; that appellant was looking to the north, and the witness ran out and alongside the truck ten or fifteen feet, waving his arms and hollering trying to get the truck to stop, while it was 35 or 40 feet back from the track; that the truck kept slowing down and "shifted or something and it pulled it right onto the main track and it was hit in 30 seconds"; that when he first attempted to signal the truck the train was 500 feet away, and was 80 to 100 feet away when the truck went onto the track.

It is elementary that cases like this involve not only the question of negligence upon the part of the defendant, but also the question of due care upon the part of the plaintiff. Under the heading "Points and Authorities" in his brief, appell-

ant cites Chicago Terminal Transfer Railroad Co. v. Schmelling, 197 Ill. 619, as holding that the question of due care cannot be raised as a matter of law by the defendant when it secured an instruction submitting the question to the jury as a question of fact. The point is not argued, no such instruction in this case is pointed out by appellant, and the abstract does not contain the instructions. By the point not being argued, we consider it as abandoned, and furthermore, we will not search the record to find some ground for reversal.

A motion for judgment notwithstanding the verdict presents the same question as a motion for a directed verdict. The question presented by either motion is whether there is any evidence fairly tending to prove the cause of action or fact affirmed. The court, on such motion does not weigh the evidence or consider its preponderance. The test of the existence of appellant's right to have the cause submitted to the jury is whether there is evidence in the record which, with all its reasonable inferences, taken in the aspect most favorable to him, may be said to be sufficient in law to support the cause of action. Under this rule, if the trial judge, who heard the testimony, was convinced that a verdict for appellant must necessarily be set aside because the evidence, with all its reasonable inferences and intendments, does not support the verdict, it then became the duty of the court to withdraw the issues from the jury and enter a finding. (Knudson v. Knudson, 362 Ill. 492, 494, and cases cited.) The above rule has been stated in varying language by the courts of this State, but as pointed out in Libby, McNeill and Libby v. Cook, 222 Ill. 206, 211, quoting numerous different expressions of the rule, they all bear precisely the same meaning.

In Jacobson v. Cummings, 318 Ill. App. 464, 467, in announcing the rule, the court said that explanatory, conflicting or contradictory evidence must be excluded from consideration. This expression is relied upon by appellant as meaning that the testimony of the witness Thomas, on direct examination to the effect that when the Fitch truck first came on the railroad tracks the train was half a mile away, is the only part of his testimony that could be considered by the trial court in passing upon the motion for judgment notwithstanding the verdict, excluding his later conflicting testimony on this point. In the case cited there was no conflict in the testimony for the plaintiff; and the expression used does not mean and was not intended to mean that where a witness contradicts himself on a material point, that the court must consider only that part of his testimony on that point which favors the party for whom he testified. Such an interpretation of the rule would abrogate the long established rule for considering the credibility of a witness, and the expression used by the court in that case obviously refers to a consideration of all the evidence, and does not support appellant's contention.

Evidence sufficient to defeat a motion for a directed verdict must be evidence upon which the jury could, without acting unreasonable, in the eye of the law, decide in favor of the party so having the affirmative. (Provenzano v. Illinois Central Railroad Co., 357 Ill. 192, 197: American National Bank v. Woolard, 342 Ill. 148.)

In the absence of willful or wanton conduct on the part of the defendant, the plaintiff cannot recover in an action for personal injuries unless it appears that he was in the exercise of ordinary care for his safety, and in such case it is the duty of the court to direct a verdict for the defendant if there is

no evidence tending to show affirmatively that the plaintiff was exercising due care or to raise a reasonable inference of such care. A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution. Although it is true that the question of contributory negligence is ordinarily a question for the jury, yet, when there is no conflict in the evidence, and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant. (Illinois Central Railroad Co. v Oswald, 338 Ill. 270, 274, 275; Wilson v. Illinois Central Railroad Co., 210 Ill. 603; Beidler v. Branshaw, 200 Ill. 425.)

In this case there is no testimony which tends to show that appellant looked towards the south as he approached the railroad, and there is no conflict in the testimony, except the conflicting statements of appellant's own witness, Thomas, which the court had a right to consider in passing upon the credibility and probative force of his testimony. It is clear that from a point fifty feet west of the railroad there was nothing to obstruct appellant's view of the track for at least a half mile south of the crossing, and that if he had looked toward the south at any time after he passed the east end of the lumber shed on the south side of the road, he could have seen the train in time to have stopped his truck before it went onto the railroad track. He was travelling at about only one mile an hour, and whether the train was a half mile away or only a few yards, his opportunity to stop was the same. The duty resting upon one who crosses a railroad track is not only to listen but to look, and the fact, if it be a fact, that no bell was rung or whistle blown, would not excuse him from using

due care to look in the direction from which a train might be coming, and in this case it is clear that had he done so, the accident would not have occurred. (Greenwald v. Baltimore and Ohio Railroad Co., 332 Ill. 627, 633.) That case is exactly in point here. Furthermore, it is also apparent that if, as Mr. Thomas first testified, the train was a half mile away when appellant's truck stalled on the railroad track, he had ample time to leave the truck and reach a place of safety before it was struck by the train. Without taking into account any of the testimony for appellees, the testimony on the part of appellant, with all inferences to be drawn therefrom, taken in the aspect most favorable to him, not only fails to show ordinary care on his part, but affirmatively discloses his contributory negligence. The judgment of the trial court must therefore be affirmed.

Judgment affirmed.

Abstract

322 I.A. 703

GEN. NO. 9941 AGENDA NO. 3

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1944.

| | | |
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| MARGARET BARRETT, APPELLANT, | ) | |
| vs. | : | APPEAL FROM THE CIRCUIT |
| PATRICK HENNEBRY, TRUSTEE under the Last Will and Testament of Mary Fitzgerald, deceased, CATHOLIC BISHOP OF CHICAGO, and REVEREND FATHER J. P. HALLIGAN, Pastor of St. Patrick's Catholic Church of Lemont, Illinois, APPELLEES. | ) | COURT OF WILL COUNTY. |

HUFFMAN, J.

Mary Fitzgerald died testate. By her will she created a trust in favor of Margaret Fitzgerald. The trust provision of the will is as follows:

"CREATION OF TRUST.

I give, devise and bequeath all the rest, remainder and residue of my estate, real, personal, and mixed, of every kind, nature and wheresoever situated, and particularly my farm consisting of one hundred and twenty (120) acres of land, with all improvements thereon,

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IN THE ATTORNEYS COURT OF PROBATE

Probate Division

Cause No. 1789, A. D. 1944.

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|---|---|
| MARGARET T. LAFAYETTE, APPELLANT, vs. MARION, DEWEY, JOHNSON Under the last will and testament of Mary Ann Smith, deceased, CATHOLIC BISHOP OF CHICAGO, and STANLEY Pierce C. S. MILLIKAN, Pastor of St. Patrick's Catholic Church of Dermott, Illinois, APPELLEES. | APPEAL FROM THE PROBATE COURT of Cook County. |

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SUPPOSE, I:

Many illegitimate also children. In her will she expressed a trust in favor of illegitimate children. The trust provision of the will is as follows:

"DONATION OF TRUST.

I give, devise and bequeath all the real, residuary and reliction of my estate, real, personal, and mixed, of every kind, nature and wheresoever situated, and particularly my farm consisting of one hundred and twenty (120) acres of land, with all improvements thereon,

located in the Township of DuPage, County of Will, and State of Illinois, to Michael J. Ray, of the Village of Lemont, Cook County, Illinois, as trustee to have and to hold the same upon the trusts and for the uses and purposes hereinafter expressed, that is to say: that he, my said trustee, shall collect all rents due from the tenant or occupant of my one hundred and twenty (120) acre farm under and according to the terms of any existing lease thereon which may be in force at the time of my decease, and from such rents or income from said trust estate shall first pay all taxes and expenses of this trust, including insurance premiums, care and maintenance of said trust estate and all reasonable compensation of my said trustee. The balance of said rents or income shall be paid by my trustee to Margaret Fitzgerald, hereinbefore mentioned as devisee and legatee, the said income to be paid in semi-annual installments on or about the first day of June and December in each year, the first of said payments to be paid to her, the said Margaret Fitzgerald, within one year from the date of my decease. If the tenancy of said farm should cease to operate by reason of default in payment of rent by the tenant, or his representative in possession of said farm, or for any other reason on the part of said tenant, then and in that event I order and instruct my trustee to cause to be instituted forthwith legal proceedings for the recovery and possession of the said one hundred and twenty acre (120) farm; that in the event of possession obtained

located in the Township of Tuscola, County of Douglas, and State of Illinois, to Margaret A. Day, of the village of Lemont, Cook County, Illinois, as trustee to have and to hold the same upon the trusts and for the uses and purposes hereinafter expressed, that is to say: that he, my said trustee, shall collect all rents due from the tenant or occupant of my one hundred and twenty (120) acre farm under and according to the terms of my existing lease thereof which may be in force at the time of my decease, and from such rents or income from said trust estate shall first pay all taxes and expenses of the trust, including insurance premiums, care and maintenance of said trust estate and all reasonable compensation of my said trustee. The balance of said rents or income shall be paid by my trustee to Margaret Fitzgerald, hereinbefore mentioned as devisee and legatee, the said income to be paid in semi-annual installments on or about the first day of June and December in each year, the first of said payments to be paid to her, the said Margaret Fitzgerald, within one year from the date of my decease. If the tenancy of said farm should cease to operate by reason of default in payment of rent by the tenant, or his representative in possession of said farm, or for any other reason on the part of said tenant, then and in that event I order and instruct my trustee to cause to be instituted forthwith legal proceedings for the recovery and possession of the said one hundred and twenty acre (120) farm; that in the event of possession obtained

as aforesaid, or possession obtained by reason of the expiration of any lease on said farm, I order and instruct my trustee to sell the said one hundred and twenty acre farm at a price to be regulated by the then prevailing price for similar land, similarly improved, in the immediate surrounding vicinity. This sale shall be made for a cash price only and shall take place as soon after my death as conveniently may be.

The proceeds from the aforesaid sale of my said one hundred and twenty (120) acre farm, after deducting all necessary costs and expenses, shall be invested in interest bearing securities, with the approval of the Judge of the Probate Court of Cook County, State of Illinois, and my said trustee shall pay in semi-annual payments the interest from the principal sum thus invested (or cause) same to be paid) to Margaret Fitzgerald, hereinbefore mentioned as legatee and devisee, for her support and maintenance, and the said payments shall continue as provided during the natural life of the said Margaret Fitzgerald.

In the event that the net income from my said trust estate is, at any time or times, in the opinion of my trustee, insufficient for the support, maintenance, (physical or otherwise) and welfare of the said Margaret Fitzgerald, hereinbefore mentioned as legatee and devisee, my trustee may from time to time, pay out such sum or sums from the principal of said trust estate, as may in his sole discretion, be necessary for that purpose. This provision is to apply

as aforesaid, or possession obtained by reason of the expiration of any lease on said farm, I order and instruct my trustee to sell the said one hundred and twenty acre farm at a price to be regulated by the then prevailing price for similar land, similarly improved, in the immediate surrounding vicinity. This sale shall be made for a cash price only and shall take place as soon after my death as conveniently may be.

The proceeds from the aforesaid sale of my said one hundred and twenty (120) acre farm, after deducting all necessary costs and expenses, shall be invested in interest bearing securities, with the approval of the Judge of the Probate Court of Cook County, State of Illinois, and my said trustee shall pay in semi-annual payments the interest from the principal sum thus invested (or cause) same to be paid) to Margaret Fitzgerald, hereinbefore mentioned as legatee and devisee, for her support and maintenance, and the said payments shall continue as provided during the natural life of the said Margaret Fitzgerald.

In the event that the net income from my said trust estate is, at any time or times, in the opinion of my trustee, insufficient for the support, maintenance, (physical or otherwise) and welfare of the said Margaret Fitzgerald, hereinbefore mentioned as legatee and devisee, my trustee may from time to time, pay out such sum or sums from the principal of said trust estate, as may in his sole discretion, be necessary for that purpose. This provision is to apply

also to the cost of funeral and burial expenses attendant upon the death of the said Margaret Fitzgerald.

As soon after my death as conveniently may be, I order and instruct my trustee to sell my said farm, for cash only, at a price to be determined by him, which said price shall be no less than the then prevailing price of similar property in the immediate surrounding vicinity and to pay forthwith from the proceeds of said sale the several cash bequests to the respective legatees hereinbefore made in my last will and Testament.

TERMINATION OF TRUST.

Upon the death of the said Margaret Fitzgerald, hereinbefore mentioned as legatee and devisee, the trust herein and hereby created shall cease and determine and my trustee shall thereupon devide the entire corpus of the trust estate then in his hands, together with all undistributed income, less a reasonable compensation, costs and expenses of my said trustee, into two equal parts, or as nearly equal as may be, and shall thereupon transfer, pay over, deliver and convey each of said parts as follows: One Part to the Catholic Bishop of Chicago, located in the City of Chicago, State of Illinois, to be used by him in his sole discretion, for the education and preparation of young men for the Roman Catholic Priesthood, and one part (the remaining part) the Pastor of St. Patrick's Catholic Church, of Lemont, Cook County, Illinois, to be used by him in his sole discretion, for the benefit of said church.

also to the cost of funeral and burial expenses attendant upon the death of the said Margaret Fitzgerald.

As soon after my death as conveniently may be, I order and instruct my trustee to sell my said farm, for cash only, at a price to be determined by him, which said price shall be no less than the then prevailing price of similar property in the immediate surrounding vicinity, and to pay forthwith from the proceeds of said sale the several cash bequests to the respective legatees herein-before made in my last will and testament.

DISTRIBUTION OF TRUST.

Upon the death of the said Margaret Fitzgerald, herein-before mentioned as legatee and devisee, the trust herein and hereby created shall cease and determine and my trustee shall thereupon devise the entire corpus of the trust estate then in his hands, together with all undistributed income, less a reasonable compensation, costs and expenses of my said trustee, into two equal parts, or as nearly equal as may be, and shall thereupon transfer, pay over, deliver and convey each of said parts as follows: One part to the Catholic Bishop of Chicago, located in the City of Chicago, State of Illinois, to be used by him in his sole discretion, for the education and preparation of young men for the Roman Catholic Priesthood, and one part (the remaining part) the Pastor of St. Patrick's Catholic Church, of Lemont, Cook County, Illinois, to be used by him in his sole discretion, for the benefit of said church.

In Testimony Whereof, I have set my hand to this my last Will and Testament (including trust estate) consisting of five (5) pages, to the first four of which I have signed my name and to this the last and fifth page I have signed my name and affixed my seal this 23rd day of November, A. D. 1923.

MRS. MARY FITZGERALD
(SEAL) "

The testatrix died June 15, 1925. The trustee named in the will predeceased the testatrix. Appellee Patrick J. Hennebry, succeeded the named trustee, under order of the circuit court of Cook county.

Appellant brought this suit in equity to recover against the trust estate for services performed on behalf of said estate at the instance of the trustee. Appellees filed motions to dismiss the complaint for want of equity. Motions to dismiss were granted. Appellant elected to stand by the pleadings, whereupon the complaint was dismissed for want of equity.

The complaint charged that Mary Fitzgerald died testate, a resident of Cook county, Illinois, on June 15, 1925; that her last will and testament was admitted to probate in said county; that pursuant to order of the circuit court of Cook county, appellee, Patrick Hennebry, was appointed trustee to carry out the trust established by the testatrix; that such appointment was because the trustee named by the testatrix in her will predeceased said testatrix; that letters

In testimony thereof, I have set my hand to this my last will and testament (including trust estate) consisting of five (5) pages, to the first four of which I have signed my name and to this the last and fifth page I have signed my name and affixed my seal this 22nd day of November, A. D. 1922.

MRS. MARY FITZGERALD
(SEAL)

The testatrix died June 15, 1922. The trustee named in the will predeceased the testatrix. Appellee Patrick G. Hanahoy, succeeded the named trustee, under order of the circuit court of Cook county.

Appellant brought this suit in equity to recover against the trust estate for services performed on behalf of said estate at the instance of the trustee. Appellee filed motions to dismiss the complaint for want of equity. Motions to dismiss were granted. Appellant elected to abide by the pleadings, whereupon the complaint was dismissed for want of equity.

The complaint contains that Mary Fitzgerald died testate, a resident of Cook county, Illinois, on June 15, 1922; that her last will and testament was admitted to probate in said county; that pursuant to order of the circuit court of Cook county, appellee, Patrick Hanahoy, was appointed trustee to carry out the trust established by the testatrix; that such appointment was because the trustee named by the testatrix in her will predeceased said testatrix; that letters

testamentary were also issued to appellee Hennebry by the probate court of Cook county; that appellee Hennebry took possession of the assets of the estate of the decedent, and proceeded to carry out the provisions of her will, and of the trust created therein, and to provide for the care, support and maintenance of Margaret Fitzgerald, the cestui, as provided for in said will; that appellee Hennebry was also appointed conservator of the estate of Margaret Fitzgerald, the cestui, who was a feeble-minded person; that as such conservator and as trustee under the will of the decedent, it became his duty to provide for the necessary care, maintenance and support of the cestui; that he entered into a contract with appellant for the furnishing of the necessary board, maintenance, support and care for said cestui at an agreed price for such services of one dollar per day; that it was agreed between the parties the appellant would be compensated for such services from the trust estate created by the will of Mary Fitzgerald; that pursuant to such contract and agreement, appellant entered upon the duties thereby devolving upon her and commenced to perform such services by furnishing board, maintenance and support for the cestui on June 29, 1925; that on said date appellant took the said Margaret Fitzgerald into her home, situated in Will county, and continued to furnish her board, maintenance and support and to care for and look after her in the residence of appellant, continuously from the said 29th day of June, 1925, until October 10, 1942, when Margaret Fitzgerald died; that appell-

testamentary were also issued to appellee Kennedy by the probate court of Cook county; that appellee Kennedy took possession of the assets of the estate of the decedent, and proceeded to carry out the provisions of her will, and of the trust created thereby, and to provide for the care, support and maintenance of Margaret Fitzgerald, the cestui, as provided for in said will; that appellee Kennedy was also appointed conservator of the estate of Margaret Fitzgerald, the cestui, who was a feeble-minded person; that as such conservator and as trustee under the will of the decedent, it became his duty to provide for the necessary care, maintenance and support of the cestui; that he entered into a contract with appellant for the furnishing of the necessary board, maintenance, support and care for said cestui at an agreed price for such services of one dollar per day; that it was agreed between the parties the appellant would be compensated for such services from the trust estate created by the will of Mary Fitzgerald; that pursuant to such contract and agreement, appellant entered upon the duties thereby devolving upon her and commenced to perform such services by furnishing board, maintenance and support for the cestui on June 29, 1925; that on said date appellant took the said Margaret Fitzgerald into her home, situated in Will county, and continued to furnish her board, maintenance and support and to care for and look after her in the residence of appellant, continuously from the said 29th day of June, 1925, until October 10, 1942, when Margaret Fitzgerald died; that appell-

ant furnished board, maintenance, support and care in accordance with the agreement and contract between her and appellee Hennebry, made subsequent to his appointment as trustee under the will of Mary Fitzgerald; that the trustee ratified and approved the agreement and made payments thereunder to appellant; that the agreement between appellant and appellee trustee was reduced to writing. (a copy of which is attached to the complaint)

The complaint further alleges that after allowing credit for the payments made by the trustee to appellant under their contract, there still remained due and unpaid to appellant, on October 10, 1942, the sum of $2841.25; that appellant had made numerous demands upon the trustee for payment of such balance, but that he had not paid same; that the services rendered by appellant were performed and the obligation and agreement to pay therefor reasonably incurred in the proper administration of the trust created by the will of the testatrix; that testatrix died seized of a farm of one hundred twenty acres, in Will county, which was devised to the trustee in trust with provision that from the rents and income he should pay the taxes and expenses of the trust, and any remaining balance he should pay to the cestui; that upon termination of the tenancy of said farm, the trustee was instructed to sell same and invest the proceeds, and to pay the interest therefrom to the cestui for her support and maintenance during her lifetime; that it was further provided by the testatrix in her will, that in

and furnishes board, maintenance, support and care in accordance with the agreement and contract between her and appellee Kennedy, made subsequent to his appointment as trustee under the will of Mary Fitzgerald; that the trustee ratified and approved the agreement and made payments thereunder to appellant; that the agreement between appellant and appellee trustee was reduced to writing, (a copy of which is attached to the complaint)

The complaint further alleges that after allowing credit for the payments made by the trustee to appellant under their contract, there still remained due and unpaid to appellant, on October 10, 1942, the sum of $[illegible].65; that appellant had made numerous demands upon the trustee for payment of such balance, but that he had not paid same; that the services rendered by appellant were performed and the obligation and agreement to pay therefor reasonably incurred in the proper administration of the trust created by the will of the testatrix; that testatrix died seized of a farm of one hundred twenty acres, in Gill county, which was devised to the trustee in trust with provision that from the rents and income he should pay the taxes and expenses of the trust, and any remaining balance he should pay to the cestui; that upon termination of the tenancy of said farm, the trustee was instructed to sell same and invest the proceeds, and to pay the interest therefrom to the cestui for her support and maintenance during her lifetime; that it was further provided by the testatrix in her will, that in

the event the net income from the trust estate at any time, in the opinion of the trustee, should be insufficient for the support and maintenance (physical or otherwise) and welfare of the cestui, then the trustee might pay out such sum or sums from the principal of the trust as in his discretion should be necessary.

The complaint further alleges that by the will of the testatrix, the trust therein created should cease upon the death of Margaret Fitzgerald, the cestui, and that upon her death, the trustee should proceed to divide the corpus of the trust estate then in his hands, together with any undistributed income, into two equal parts, one of which should go to the Catholic Bishop of Chicago, and the other to the Pastor of St. Patrick's Catholic Church of Lemont, in Cook county. It is alleged the trustee is insolvent; and that there is not sufficient cash or assets in his possession as trustee to pay plaintiff's claim. Appellant avers the claim is a valid charge against the trust estate created by the testatrix, and that it will be necessary to sell the real estate for the purpose of paying such claim and making distribution of the trust estate according to the terms of the will. Appellant alleges that she should be entitled in equity, to a lien upon the real estate described, for the payment of her claim, that the said farm should be sold and her claim satisfied. Appropriate prayer for relief concludes the complaint.

In order that the reasons for the conclusions reached

the event the net income from the trust estate at any time, in the opinion of the trustee, should be insufficient for the support and maintenance (physical or otherwise) and welfare of the cestui, then the trustee might pay out such sum or sums from the principal of the trust as in his discretion should be necessary.

The complaint further alleges that by the will of the testatrix, the trust therein created should cease upon the death of Margaret Kiteregerald, the cestui, and that upon her death, the trustee should proceed to divide the corpus of the trust estate then in his hands, together with any undistributed income, into two equal parts, one of which should go to the Catholic bishop of Chicago, and the other to the Pastor of St. Patrick's Catholic Church of Ashmont, in Cook county. It is alleged the trustee is insolvent; and that there is not sufficient cash or assets in his possession as trustee to pay plaintiff's claim. Appellant avers the claim is a valid charge against the trust estate created by the testatrix, and that it will be necessary to sell the real estate for the purpose of paying such claim and making distribution of the trust estate according to the terms of the will. Appellant alleges that she should be entitled in equity, to a lien upon the real estate described, for the payment of her claim, that the said farm should be sold and her claim satisfied. Appropriate prayer for relief concludes the complaint.

In order that the reasons for the conclusions reached

herein may appear, a somewhat extended opinion is necessary. Also, in the consideration of this appeal, the allegations of the complaint are accepted as true.

Appellees urge that the terms of the will did not authorize the contract in question nor the incurring of the indebtedness thereunder. They support their position with reference to such cases as Stephen v. Collison, 274 Ill. 389; Wall v. Schmidt, 307 Ill. 331; Kerner v. George, 321 Ill. App. 150; Sheets v. Security First Mortg. Co., 293 Ill. App. 222; O'Connell v. Horwich, 284 Ill. App. 554; Austin v. Parker, 317 Ill. 348, and Martin v. Rockford Trust Co., 281 Ill. App. 441. The rules announced in the foregoing cases are in general application throughout the various jurisdictions.

Appellant urges that since the purpose and object of the trust was to provide for the care, maintenance and welfare of Margaret Fitzgerald, that in furnishing such care, maintenance and support, she was performing services anticipated by the trust instrument, and for which the same was created. She therefore takes the position that the trustee had power under the terms of the will and of the trust, to incur the expenditures involved; that the estate was bound by the act of the trustee; and that she should not be denied her remedy.

This is a testamentary trust. Frequently the subject of such trusts come under consideration of the courts. We are of the opinion it will generally be found that the determining factor in such cases is the intention of the testator as dis-

herein may appear, a more that extended opinion is necessary. Also, in the consideration of this appeal, the allegations of the complaint are accepted as true.

Appellees urge that the terms of the will did not authorize the contract in question nor the incurring of the indebtedness thereunder. They support their position with reference to such cases as Stephen v. Collins, 274 Ill. 329; Wall v. Schmidt, 327 Ill. 231; Horner v. George, 321 Ill. App. 180; Sheets v. Security First Nat'l. Co., 295 Ill. App. 222; O'Connell v. Norwich, 284 Ill. App. 374; Austin v. Parker, 317 Ill. 348, and Martin v. Hockford Trust Co., 281 Ill. App. 441. The rules announced in the foregoing cases are in general application throughout the various jurisdictions.

Appellant urges that since the purpose and object of the trust was to provide for the care, maintenance and welfare of Margaret Fitzgerald, that in furnishing such care, maintenance and support, she was performing services authorized by the trust instrument, and for which the trust was created. She therefore takes the position that the trustee had power under the terms of the will and of the trust, to incur the expenditures involved; that the estate was bound by the act of the trustee; and that she should not be denied her remedy.

This is a testamentary trust. Frequently the subject of such trusts come under consideration of the courts. We are of the opinion it will generally be found that the determining factor in such cases is the intention of the testator as dis-

closed by the words used in the instrument to be construed. The beneficiary of this trust was a feeble-minded person, and therefore unable to look after herself. It appears from the complaint, that by agreement between appellant and the trustee, appellant took her to her home on June 29, 1925, and continued to keep her and look after her until her death on October 10, 1942. This was a period of over seventeen years. It further appears from the complaint that for a period of about ten years the trustee paid appellant under their agreement. The amount claimed remaining due is $2841.25, which would be for a period of approximately seven years and nine months. There is nothing to show that the trustee ever indicated to appellant his decision to terminate the arrangement between them. The fact he paid appellant for approximately ten years and permitted the unpaid balance to accrue, would indicate the income from the trust estate was not sufficient to pay both the expenses of the trust and appellant. The estate appears to consist of the one hundred and twenty acre farm, upon which taxes as well as other necessary expenses would arise.

The powers of a trustee may be said to be divided into express powers and implied powers. The former appear from the language of the trust instrument itself, while the latter are inherent to the purposes and intent of the trust created and the objects to be attained thereby. In these things, certain acts may become necessary and incidental to an execution of the express powers stated. Express powers are usually

closed by the words used in the instrument to be construed. The beneficiary of this trust was a feeble-minded person, and therefore unable to look after herself. It appears from the complaint, that by agreement between appellant and the trustee, appellant took her to her home on June 29, 1922, and continued to keep her and look after her until her death on October 10, 1926. This was a period of over seventeen years. It further appears from the complaint that for a period of about ten years the trustee paid appellant under their agreement. The amount claimed remaining due is $2641.25, which would be for a period of approximately seven years and nine months. There is nothing to show that the trustee ever indicated to appellant his decision to terminate the arrangement between them. The fact he paid appellant for approximately ten years and permitted the unpaid balance to accrue, would indicate the income from the trust estate was not sufficient to pay both the expenses of the trust and appellant. The estate appears to consist of the one hundred and twenty acre farm, upon which taxes as well as other necessary expenses would arise.

The powers of a trustee may be said to be divided into express powers and implied powers. The former appear from the language of the trust instrument itself, while the latter are inherent to the purposes and intent of the trust created and the objects to be attained thereby. In these matters, certain acts may become necessary not incidental to an execution of the express powers stated. Express powers are usually

in clear and unequivocal terms, while implied powers are so inherently associated with the administration of the trust that in order for the trustee to administer the same according to the wishes and directions of the settlor, it must be considered that the settlor intended the trustee should use the ordinary and natural means for obtaining the result expressed by the settlor.

A trustee has the power to enter into a contract with a third person in the course of the administration of a trust when such power is expressly given him by the trust instrument, or when the making of the agreement is reasonably necessary to the execution of the purposes of the trust, and therefore impliedly authorized. In ascertaining whether the trustee has power to make a contract of the latter class, reference must be had to the question whether the contract has any important bearing upon the accomplishment of the object which the creator of the trust intended to reach through such trust.

Where a trustee conforms to the provisions of the trust in their true spirit and meaning, he may in the doing thereof, adopt measures and do acts which, though not expressly specified in the trust instrument, are implied in its terms and directions given, and which are reasonable and proper means for making such express terms and provisions effectual.

One of the fundamental duties of a trustee is, that he must maintain loyalty and fidelity throughout the administration of the trust, to the interest of the cestui que trust.

to clear and unobjectionable terms, which should secure to
an intelligent acceptance with the satisfaction of the
people that in order for the benefit of existing and law
according to the rules and regulations of the nation, it
must be considered that the nation through the business
should use the ordinary and natural means for obtaining
the result expressed by the editor.

A trustee has the power to enter into a contract with
a third person in the matter of the administration of a trust
when such power is expressly given him by the grant of trust,
or when the nature of the agreement is reasonably necessary
for the execution of the purposes of the trust, and therefore
legally authorized. In determining whether the trustee
has power to make a contract of the labor class, reference
must be had to the question such as the contract, the
important bearing upon the accomplishment of the object which
has occasioned the trust intended to reach this or such trust.

Where a trustee contracts in the prosecution of the trust
in order that spirit and energy, he may be the right manner,
adopt measures and do acts which, though not expressly specified
in the trust instrument, are implied in its terms and directions
given, and which are reasonable and proper means for making such
express terms and directions effectual.

The of the fundamental duties of a trustee is, that he
must maintain loyalty and fidelity throughout the administra-
tion of the trust, in the interest of the cestui que trust.

Furthermore, it is his duty to support the trust. The foregoing situations have frequently occasioned litigation, and courts are generally disposed to find that the creator of a trust, by implication, would be held to have intended the trustee should have the power to do that which is necessary to accomplish the ends expressed by the founder of the trust.

In considering the execution of this trust, the court has a right to take into consideration the situation of the cestui, her lack of capacity to manage and look after her own affairs, and the desire of the testatrix to make provision for her care and support during her lifetime. Such is the apparent purpose and desire of the testatrix, because she makes the entire corpus of the trust subject to such requirements of the cestui. While the application of the corpus to the cestui's needs was in the nature of a discretionary power given to the trustee, yet it was one which required the exercise of honest judgment and good faith. We are not of the opinion discretionary powers granted a trustee can be so broad that equity will not entertain jurisdiction when the trust is being or has been abused, or so administered as to defeat the purpose for which the founder established it.

When the trustee entered into the agreement with appellant in 1925, we are not of the opinion he did violence to the trust imposed by the will of the testatrix. It is clearly apparent the testatrix desired the cestui to be the beneficiary of the net income from the trust, and if necessary, the corpus,

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When the trustee entered into the agreement with appellant in 1928, we are not of the opinion he did violence to the trust imposed by the will of the testatrix. It is clearly apparent the testatrix desired the cestui to be the beneficiary of the net income from the trust, and if necessary, the corpus,

for her care and support during her lifetime. Taking into consideration the fact the cestui was a feeble-minded person, and an object of the bounty of the testatrix, we are not of the opinion the trustee acted contrary to the purpose and intent of the testatrix in making provision for the care and keep of the cestui. Neither did he act in any way to the prejudice of the interests of the cestui. The agreement between the trustee and appellant was for the necessities of life for the beneficiary of the trust, as well as for provision for someone to look after her and some place to keep her. It would appear the act of the trustee was in harmony with the purposes of the trust and in furtherance of the end intended to be attained thereby. The cestui received the benefit of appellant's services and the money she expended in keeping and caring for her over the years.

The trust estate was charged with the care, maintenance and support of the beneficiary. Since the services rendered and the money expended by appellant were for such purposes, they must be deemed to have been for the benefit of the trust estate.

As previously stated, appellees urged the trustee had no power under the trust instrument either to enter into the contract with appellant, or to create such indebtedness. In consideration of these premises, they argue that the contract was ultra vires, and appellant thereby precluded from any right to satisfaction out of the trust property. Where a cestui has received benefits from the performance of an ultra vires con-

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tract by a third party, equity in proper cases, will give relief and compel compensation of third party out of the trust property when such acts are necessary in order to prevent unjust enrichment of the cestui or of the trust estate, at the expense of such third party. Bogert on Trusts, Vol. 3, Para. 713. Appellant in this action seeks the aid of equity to cause the trust estate to make settlement for services and for money and property furnished by her, for the benefit of the trust, and which she claims it has no right to retain, to her injury and prejudice. A somewhat similar legal status appears in the case of The State Bank of Blue Island v. Benzing, 383 Ill. 40, 55.

In this case, the cestui was a feeble-minded person. The trust was created for her care, support, maintenance and welfare. The acts of appellant and of the trustee appear to have been pursuant to such purpose, and of a nature anticipated by the testatrix.

The judgment of the trial court is reversed and the cause remanded with directions to overrule the motions to dismiss the complaint.

Reversed and remanded with directions.

trust or a third party, acting in proper cases, will give relief and compel conversion of third party out of the trust property when such acts are necessary in order to prevent unjust enrichment of the estate or of the trust estate, at the expense of such third party. Report to Trusts, Vol. 3, Tex. Jur. Injunction in equity-action seeks the aid of equity to compel the trust funds to be used beneficiaries for services and for money and property furnished by her, for the benefit of the trust, and which she claims it has no right to recall, to an injury and irreparable. A sequestrat similar in effect appears in the case of the State Bank of Blue Island v. Cerasine, 302 Ill. 41, 43.

I. This case, the court was a double-minded person. The trust was created for life care, support, maintenance and welfare. The acts of appellant and of the trustee appear to have been pursuant to such purpose, and by a mature and-- directed by the testatrix.

The judgment of the trial court is reversed and the cause remanded with directions to overrule the motions to dismiss the complaint.

Reversed and remanded with directions.

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